Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SCOT L. ZIMMERMAN,

Petitioner,

v.

STATE OF OREGON DEPARTMENT OF JUSTICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title II of the Americans With Disabilities Act prohibits discrimination on the basis of disability in the provision of public services, programs, and activities. The Ninth Circuit in this case held that Title II does not reach employment discrimination, expressly rejecting the contrary view of every other court of appeals to address the issue and acknowledging that its "decision creates an inter-circuit split of authority." As three-judges noted in dissenting from the denial of rehearing *en banc*, this is an "important [issue] of national significance" on which "[t]he Ninth Circuit now stands alone" because "the panel's opinion conflicts either directly or indirectly with the position taken by every circuit to confront the question," as well as with "18 of the 21 published district court opinions" and "4 out of 6 unpublished district court decisions."

The question presented is:

Whether Title II of the ADA reaches employment discrimination?

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT UNDER S. CT. RULE 29.4(B) 1
STATUTORY PROVISION AND REGULATION INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 7
CONCLUSION 16

TABLE OF AUTHORITIES

Pages

Cases

Alstook v. *City of Maumelle*, No. 97-1825, 1999 U.S. App. LEXIS 16945 (8th Cir. July 23, 1999)..... 8, 12, 13

Amos v. *Maryland Department of Public Safety & Correctional Services*, 178 F.3d 212 (4th Cir. 1999)..... 13

Bledsoe v. *Palm Beach County Soil & Water Conservation District*, 133 F.3d 816, *reh'g en banc denied*, 140 F.3d 1044, *and cert. denied*, 119 S. Ct. 72 (1998)..... passim

Bracciale v. *City of Philadelphia*, Civ. A. No. 97-2464, 1997 U.S. Dist. LEXIS 16757 (E.D. Pa. Oct. 29, 1997)... 15

Castellano v. *City of New York*, 142 F.3d 58 (2d Cir. 1998)..... 8

City of Boerne v. *Flores*, 521 US 507 (1997)..... 13

Clark v. *California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998)..... 13

Consolidated Rail Corp. v. *Darrone*, 465 US 624 (1984)..... 6

Coolbaugh v. *Louisiana*, 136 F.3d 430 (5th Cir.), *cert. denied*, 119 S. Ct. 58 (1998)..... 13

Crawford v. *Indiana Department of Corrections*, 115 F.3d 481 (7th Cir. 1997)..... 13

Dertz v. *City of Chicago*, 912 F. Supp. 319 (N.D. Ill. 1995)..... 15

Doe v. *County of Milwaukee*, 871 F. Supp. 1072 (E.D. Wisc. 1995)..... 15

Doe v. *University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995)..... 8

Dominguez v. *City of Council Bluffs*, 974 F. Supp. 732 (S.D. Iowa 1997)..... 10, 15

Downs v. *Massachusetts Bay Transportation Authority*, 13 F. Supp. 2d 130 (D. Mass. 1998) 10

Edelman v. *Jordan*, 415 US 651 (1978) 14

Ethridge v. *State of Alabama*, 847 F. Supp. 903 (M.D. Ala. 1993) 10

Fobar v. *City of Dearborn Heights*, 994 F. Supp. 878 (E.D. Mich. 1998) 10, 15

Ford Motor Co. v. *Department of Treasury*, 323 US 459 (1945) 14

Hernadez v. *City of Hartford*, 959 F. Supp. 125 (D. Conn. 1997) 10, 15

Holbrook v. *City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997) 15

Holmes v. *Texas A & M*, 145 F.3d 681 (5th Cir. 1998) 8

Innovative Health Systems v. *City of White Plains*, 117 F.3d 37 (2d Cir. 1997) 8

Kimel v. *Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901 (1999)... 12, 13, 14

Lundstedt v. *City of Miami*, No. 93-1402-CIV-Marcus, 1995 U.S. Dist. LEXIS 21884 (S.D. Fla. Oct. 11, 1995) 15

Motto v. *City of Union City*, Civ. A. No. 95-5678, 1997 U.S. Dist. LEXIS 23401 (D.N.J. Aug. 27, 1997) 15

Norman-Bloodsaw v. *Lawrence Berkeley Laboratory*, 135 F.3d 1260 (1998) 7

Olmstead v. *L.C.*, 119 S. Ct. 617, *amended by*, 119 S. Ct. 633 (1998) (order limiting grant of certiorari) 12

Petersen v. *University of Wisconsin Board of Regents*, 818 F. Supp. 1276 (W.D. Wisc. 1993) 10

Saylor v. *Ridge*, 989 F. Supp. 680 (E.D. Pa. 1998) 10

Silk v. *City of Chicago*, No. 95 C 0143, 1996 U.S. Dist. LEXIS 8334 (N.D. Ill. June 6, 1996) 15

Wilson v. *Armstrong*, 118 S. Ct. 2340 (1998) 12

Winfrey v. *City of Chicago*, 957 F. Supp. 1014 (N.D. Ill. 1997) 15

Statutes

29 USC 701 5

29 USC 794 ..... 6, 11

42 USC 12131 11

42 USC 12132 ..... passim

42 USC 12133 5

42 USC 12134 ..... 4, 6, 12

42 USC 12202 13

Other Authorities

28 CFR 35.140 ..... 2, 3, 12

28 CFR 41.1 6

H.R. Rep. No. 101-485(II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 9

H.R. Rep. No. 101-485(III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445 ..... 9, 48

PETITION FOR A WRIT OF CERTIORARI

Petitioner Scot L. Zimmerman respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's opinion dismissing Petitioner's complaint, App. 1-7, is published at 983 F. Supp. 1327. The Ninth Circuit's opinion (per Graber, J.) affirming, App. 8-35, is published at 170 F.3d 1169. The Ninth Circuit's order denying rehearing *en banc*, accompanied by the dissenting opinion of three judges, App. 36-51, is not yet published.

JURISDICTION

The Ninth Circuit entered its judgment on March 18, 1999, and denied rehearing *en banc* on July 28, 1999. Petitioner invokes this Court's jurisdiction under 28 USC 1254(1).

STATEMENT UNDER S. CT. RULE 29.4(B)

Because this proceeding will draw into question the constitutionality of Title II of the Americans With Disabilities Act if Respondent asserts sovereign immunity in this Court, and because neither the United States nor any agency, officer, or employee thereof is a party, Petitioner notes that 28 USC 2403(a) may apply. The constitutionality of Title II was not called into question below and, accordingly, no court of the United States as defined by 28 USC 451 has, pursuant to 28 USC 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress is drawn in question. Petitioner is serving this Petition on the Solicitor General of the United States. *See* S. Ct. R. 29.4(B).

STATUTORY PROVISION AND REGULATION INVOLVED

Title II of the Americans With Disabilities Act, 42 USC 12132, provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, on the basis of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The relevant regulation of the Department of Justice, 28 CFR 35.140(a), provides:

> No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

STATEMENT OF THE CASE

1. As in Petitioner's complaint, Respondent Oregon Department of Justice hired Petitioner as a child support agent in early 1995. Petitioner, who is visually impaired as a result of a disabling eye condition, requested that Respondent reasonably accommodate his disability. Respondent refused, however, and furthermore retaliated against Petitioner, ultimately terminating him in December 1995. App. 8.

Petitioner subsequently brought this action against Respondent under Titles I and II of the Americans With Disabilities Act ("ADA") and state law. The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(6). Two of Petitioner's claims are not relevant here. The district court dismissed Petitioner's Title I claim for failure to exhaust required administrative remedies. App. 4. The district court dismissed Petitioner's state law claim on the basis of sovereign immunity. *Id.* 7.

Regarding Petitioner's third claim, which is at issue here, the district court held that Title II of the ADA does not reach employment discrimination. App. 6. The court acknowledged that "[t]he Justice Department interprets Title II as prohibiting employment discrimination, while courts addressing the issue are split, with a majority agreeing with the Justice Department." *Id.* 4 (citing 28 CFR 35.140(a)). The court rejected the majority view, however, as "inconsistent with the structure of the ADA as a whole." *Id.* 5. Because Title I of the ADA "create[s] a comprehensive scheme prohibiting employment discrimination," "[a]llowing employment discrimination claims under Title II would make Title I almost completely redundant as applied to public employees." *Id.* In particular, according to the district court, finding that Title II reached employment discrimination would permit claimants to circumvent the administrative exhaustion requirements of Title I. *Id.* 5.

2. Petitioner appealed the dismissal of his Title II claim, supported by the Department of Justice as *amicus curiae*,[1] but the Ninth Circuit affirmed. App. 8. Citing decisions of a number of other circuits and a variety of district courts, the court acknowledged that "most courts have held that Title II applies to employment," *id.* 33-34 & nn.15-19, but concluded that "we simply do not find them persuasive," *id.* 35. *See also id.* ("We realize that our decision creates an inter-circuit split of authority."). Instead, the court concluded that the text of Title II unambiguously does not reach employment discrimination, *id.* 13, and that, "[e]ven were the wording of Title II ambiguous, by itself, the structure of the ADA as a whole unambiguously demonstrates that Congress did not intend for Title II to apply to employment," *id.* 19. Thus, although the Ninth Circuit recognized that the Department of Justice's contrary regulation was issued pursuant to express

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[1] Petitioner is lodging with this Petition the *amicus curiae* brief filed by the Department of Justice.

congressional direction, 42 USC 12134(a), and is entitled to substantial deference under *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 467 US 837 (1984), the court held the regulation invalid. App. 13.

a. Addressing the text of Title II itself, the Ninth Circuit concluded that because "employment by a public entity is not commonly thought of as a 'service, program, or activity of a public entity,'" this clause in the statute applies to only "the 'outputs' of a public agency, not to 'inputs' such as employment." App. 14. The court reasoned that "a Parks Department would answer the question, 'What are the services, programs, and activities of the Parks Department?'" by explaining, "We operate a swimming pool; we lead nature walks; we maintain playgrounds." *Id.* 14-15. The Parks Department would deem employment, by contrast, as "a means to deliver [its] services, programs, and activities." *Id.* 15.

The Ninth Circuit also refused to attribute independent significance to the second clause of Title II, which prohibits "discrimination by any [public] entity." App. 17. The court reasoned that "the placement of the second clause in the single sentence that forms 42 U.S.C. 12132 suggests that the second clause relates back to the same 'services, programs, or activities' of a public entity that the first clause covers." *Id.* Furthermore, an ADA plaintiff may prevail only if he or she is a "qualified individual with a disability," *see* 42 USC 12132, defined as a person who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity," *id.* § 12132(2). Thus, according to the Ninth Circuit, "[t]he second clause of § 12132 must relate to a government service, program, or activity; otherwise a plaintiff is not 'qualified' to bring a claim under that clause." App. 18.

b. The Ninth Circuit found its holding buttressed by the structure of the ADA as a whole:

The structure of the ADA demonstrates congressional intent in five main ways:

(1) Congress placed employment-specific provisions in Title I, which it labeled "Employment," whereas Congress placed no employment-related provisions in Title II, which it labeled "Public Services."

(2) Congress defined "qualified individual with a disability" differently in Title I than in Title II. In Title I, a person is "qualified' if the person can work, whereas in Title II a person is "qualified" if the person is eligible to receive services or participate in a publicly provided program.

(3) Allowing employment discrimination claims under Title II would make Title I redundant as applied to public employees and would eviscerate the procedural requirements of Title I for these employees.

(4) Congress gave regulatory authority to different agencies for Title I and Title II. Congress gave authority over Title I to the EEOC, the agency that administers most federal employment-related statutes.

(5) Congress expressly linked the employment related-provisions of the Rehabilitation Act to Title I of the ADA, not to Title II.

App. 19-20; *see generally id.* 19-24.

The Ninth Circuit acknowledged that the Eleventh Circuit, in finding that Title II does reach employment discrimination, had relied on the statute's legislative history, but concluded without further explanation that the "legislative history [is] ambiguous at best." *Id.* 24 n.12.

c. The Ninth Circuit also rejected Petitioner's contention that Title II of the ADA incorporates the prohibition on employment discrimination set forth in the Rehabilitation Act, 29 USC 701 *et seq.* Addressing 42 USC 12133, which expressly incorporates the "remedies, procedures, and rights set

forth in" 29 USC 794(a), the court of appeals concluded that "[t]hat section includes the Rehabilitation Act's *procedural* rights, not its substantive rights." App. 25 (emphasis added). Addressing 42 USC 12134(b), which requires that regulations issued under Title II "be consistent with * * * regulations under" 28 USC Part 41, which in turn prohibit employment discrimination, *see* 28 CFR 41.1 *et seq.*, the court of appeals took the view that the statute requires only "compatib[ility]" between regulations under Title II and the Rehabilitation Act. App. 26.

The Ninth Circuit also refused to find that Title II reaches employment discrimination based on its parallel to section 504 of the Rehabilitation Act, 29 USC 794(b), which this Court has held applies to employment discrimination, *Consolidated Rail Corp.* v. *Darrone*, 465 US 624, 631-34 (1984). At the time of the *Consolidated Rail* decision, Section 504 governed "any program or activity receiving Federal financial assistance," while Title II governs "the services, programs, or activities of a public entity." According to the Ninth Circuit, "[t]he focus" of Section 504 "is the receipt of Federal financial assistance," which "naturally encompasses the entire operation of the program or activity," while "the focus of Title II of the ADA is on the services, programs, or activities that a public entity provides. That is an outward-looking focus." App. 30. Furthermore, the Rehabilitation Act, unlike Title II, contains several provisions relating to employment and no separate title directed at employment discrimination. *Id.* 32.

d. Petitioner's petition for rehearing *en banc* was denied over the extensive dissent of three judges. App. 36-51. Citing voluminous district court and court of appeals authority, the dissent explained that "the panel's opinion conflicts either directly or indirectly with the position taken by every circuit

to confront the question," as well as with eighteen published and four unpublished district court decisions. *Id.* 37 & n.1.[2]

3. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because, as the Ninth Circuit itself recognized, the decision below creates an irreconcilable conflict with decisions of other circuits. The Eleventh Circuit, for example, recently has considered in detail the arguments adopted by the Ninth Circuit, rejected them, and denied rehearing *en banc*. *Bledsoe* v. *Palm Beach County Soil & Water Conserv. Dist.*, 133 F.3d 816, *reh'g en banc denied*, 140 F.3d 1044, *and cert. denied*, 119 S. Ct. 72 (1998). Only this Court can resolve the conflict and, because the conflicting positions already are fully ventilated in the lower courts, there is no basis for deferring the question to a later date.

Certiorari also is warranted because the decision below is erroneous. Even under the most charitable reading to Respondent, Title II is ambiguous about its application to employment discrimination. But even accepting such an ambiguity, the courts must defer to the authoritative regulation issued by the Department of Justice at Congress' direction, which specifically encompasses employment discrimination.

Finally, this case is an appropriate vehicle to resolve a separate conflict over whether Title II validly abrogates states' sovereign immunity. Absent such an abrogation, Petitioner cannot prevail against Respondent, which is an arm of the State of Oregon. The *en banc* Eighth Circuit recently held that the Eleventh Amendment bars such claims, expressly rejecting the contrary view of six other circuits. *Alstook* v. *City*

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[2] The dissent noted, App. 37, that the Ninth Circuit itself had applied Title II to an employment claim "without discussion" in *Norman-Bloodsaw* v. *Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1272 (1998), which is of course no longer good law after the panel's opinion in this case.

of Maumelle, No. 97-1825, 1999 U.S. App. LEXIS 16945, *13 (July 23, 1999).

1. The decision below consciously "creates an inter-circuit split of authority." App. 35. At least four other circuits have applied Title II to employment claims. *See id.* 37 (dissent from denial of rehearing *en banc*, citing *Bledsoe* v. *Palm Beach County Soil & Water Conserv. Dist.*, *supra*, 133 F.3d 816 (11th Cir. 1998); *Castellano* v. *City of New York*, 142 F.3d 58 (2d Cir. 1998); *Holmes* v. *Texas A & M*, 145 F.3d 681 (5th Cir. 1998); *Doe* v. *University of Md. Med. Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995)). In particular, the Eleventh Circuit recently considered this question in detail and concluded that Title II reaches employment discrimination. *Bledsoe*, *supra*. The Ninth Circuit in this case, in turn, repeatedly quoted and rejected the Eleventh Circuit's ruling. App. 16, 28, 32, 33. *Bledsoe* is, moreover, embedded precedent given that the Eleventh Circuit, like the Ninth Circuit here, refused to rehear the case *en banc*.

a. The plaintiff in *Bledsoe*, who worked for a state agency in a position that required substantial walking, seriously injured his leg. The agency offered him one alternative position, which he declined, then terminated him. After the district court dismissed the plaintiff's Title II employment discrimination suit, the Eleventh Circuit reversed, "join[ing] several other courts which have held that Title II does encompass employment discrimination." 133 F.3d 816, 820-21 & n.4 (citing *Doe* v. *University of Md. Med. Sys. Corp.*, *supra*, 50 F.3d 1261 (4th Cir.); *Innovative Health Sys.* v. *City of White Plains*, 117 F.3d 37 (2d Cir. 1997); and thirteen district court decisions).

The Eleventh Circuit rejected the view of the district court that the provisions of Title II, "understood as a whole, focus on a public entity's outputs rather than its i[n]puts." 133 F.3d at 821. That view, the court of appeals explained, "ignore[s] the prohibition in the final clause of the section, which protects qualified individuals with a disability from being

'subjected to discrimination by any such entity,' and is not tied directly to the 'services, programs, or activities' of the public entity." *Id.*

The Eleventh Circuit also found that "[e]xtensive legislative commentary regarding the applicability of Title II to employment discrimination" was "so pervasive as to belie any contention that Title II does not apply to employment actions." 133 F.2d at 821. The House Report on the statute, in particular, expressly states that Title II encompasses employment discrimination to the same extent as Title I. H.R. Rep. No. 101-485(III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473 ("H.R. Rep. 485(III); H.R. Rep. No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367. The legislative history furthermore states that Congress intended Title II to "work in the same manner as Section 504" of the Rehabilitation Act, which prohibits employment discrimination. H.R. Rep. 485(III), 49-50, *reprinted in* 1990 U.S.C.C.A.N. at 472-73.

Even if the statute were ambiguous, the Eleventh Circuit reasoned, deference would be due the regulations of the Department of Justice, which provide that Title II prohibits employment discrimination. 133 F.3d at 822. In particular, the House Report on the statute expressly notes that because, "[u]nlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit," Congress expressly "direct[ed] the Attorney General to issue regulations setting forth the forms of discrimination prohibited." H.R. Rep. 101-485(III), at 52, *reprinted in* 1990 U.S.C.C.A.N. at 475. Given that the Department's regulations are not "arbitrary, capricious, or manifestly contrary to the statute," the Eleventh Circuit held that they must be enforced under *Chevron, U.S.A.* v. *Natural Resources Defense Council*, *supra*.

b. Only this Court can provide a uniform national interpretation of Title II because, in addition to the circuit split precipitated by the decision below, the Ninth Circuit's hold-

ing conflicts with an extraordinary array of district court authority. The opinion dissenting from the denial of rehearing *en banc*, for example, collects eighteen published and four unpublished district court opinions from eleven circuits that apply Title II to employment discrimination. App. 37-38 n.1. The panel opinion itself acknowledges most of these decisions, many of which contain substantial and detailed analyses of the question. App. 34 nn.15-19. *See, e.g.*, *Downs* v. *Massachusetts Bay Transp. Auth.*, 13 F. Supp. 2d 130 (D. Mass. 1998); *Fobar* v. *City of Dearborn Heights*, 994 F. Supp. 878 (E.D. Mich. 1998); *Saylor* v. *Ridge*, 989 F. Supp. 680 (E.D. Pa. 1998); *Dominguez* v. *City of Council Bluffs*, 974 F. Supp. 732 (S.D. Iowa 1997); *Hernadez* v. *City of Hartford*, 959 F. Supp. 125 (D. Conn. 1997); *Ethridge* v. *State of Ala.*, 847 F. Supp. 903 (M.D. Ala. 1993); *Petersen* v. *University of Wisc. Bd. of Regents*, 818 F. Supp. 1276 (W.D. Wisc. 1993).

The decision below and the numerous decisions holding that Title II applies to employment discrimination fully explore and ventilate the various arguments on either side of the conflict. There is, accordingly, no basis for this Court to defer addressing the question. To the contrary, certiorari should be granted at the earliest possible opportunity so that the decision below does not generate needless litigation over the scope of Title II in pending and subsequently filed cases.

2. Certiorari also is warranted because the decision below is erroneous. We will not recite here all of the errors of the panel opinion, but instead direct the Court's attention to the Eleventh Circuit's decision in *Bledsoe*, *supra*, as well as the extensive dissent from the denial of rehearing *en banc* in this case, App. 36-51. In sum, however, the plain language of the first clause of Title II prohibits discrimination in *all* conduct of public entities in providing "services, programs, or activities." 42 USC 12132. The Ninth Circuit's contrary conclusion, which rests on a "concocted," App. 41 (dissent from the denial of rehearing *en banc*), distinction between public enti-

ties' "inputs" and "outputs," can only "plunge [courts] into the impossible task of categorizing municipal and state functions and activities into two newly created categories * * * with no standards or definitions to guide the entities or parties involved," *id.* 41-42.

Furthermore, the second clause of Title II – prohibiting "discrimination by any [covered] entity" – "plainly and unequivocally prohibits covered entities from engaging in *any* discrimination." App. 43 (dissent from the denial of rehearing *en banc*) (emphasis added). The Ninth Circuit reached the opposite conclusion by reading a *definitional* provision – 42 USC 12131(2) (defining "qualified individual with disability") – to encompass only "services, programs, or activities" of public entities. But this reading renders redundant the second clause of Title II, which can only naturally be read to cover more than the first clause's reference to "services, programs, [and] activities."[3]

The decision below further errs by failing to abide by Congress' directive that Title II is to be applied consistently with the Rehabilitation Act, which this Court has held prohibits employment discrimination. Congress modeled Title II of the ADA after the Rehabilitation Act, employing remarkably similar language in the two statutes. *Compare* 42 USC 12132 *with* 29 USC 794. The decision below skirts past this point and reasons that Congress imported only a "procedural" provision of the Rehabilitation Act. App. 25. But the provision in question expressly applies to "any employee or applicant for employment," 29 USC 794a, making plain that the statute encompasses employment-related decisions.

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[3] Nor does the conclusion that Title II of the ADA applies to employment discrimination render Title I superfluous. Among other things, Title II, unlike Title I, does not apply to private sector employment. *See generally* App. 45-46 (dissent from the denial of rehearing *en banc*) (discussing multiple differences in scope of Titles I and II, including with respect to covered employers, history, and potential remedies).

At most, the arguments mustered by the Ninth Circuit identify ambiguities regarding the scope of Title II. But any such ambiguities have been resolved by the Department of Justice, pursuant to an express direction of Congress, which has issued a regulation providing that Title II encompasses employment discrimination. 42 USC 12134; 28 CFR 35.140. The regulation is entitled to "substantial weight," *Chevron, U.S.A.* v. *Natural Resources Defense Council*, *supra*, 467 US at 844, and when read in combination with the legislative history expressly stating that Title II encompasses employment discrimination, *see supra* at 9, compels the conclusion that the decision below is erroneous.

3. a. Certiorari also is warranted because this case is an appropriate vehicle to resolve a circuit conflict over whether Title II constitutes a valid abrogation of states' sovereign immunity from suit. Until recently, the courts of appeals uniformly had found the abrogation valid, and this Court accordingly has denied certiorari on that question. *E.g.*, *Wilson* v. *Armstrong*, 118 S. Ct. 2340 (1998); *Olmstead* v. *L.C.*, 119 S. Ct. 617, *amended by*, 119 S. Ct. 633 (1998) (order limiting grant of certiorari). More recently, the Court has held the petition for certiorari in No. 98-829, *Florida Department of Corrections* v. *Dickson*, in abeyance, presumably pending the disposition of No. 98-796, *United States* v. *Florida Board of Regents* and No. 98-791, *Kimel* v. *Florida Board of Regents*, *cert. granted on a separate question*, 119 S. Ct. 901 (1999), which address whether the Age Discrimination In Employment Act ("ADEA") constitutes a valid abrogation of state sovereign immunity.

An irreconcilable conflict in the circuits now has emerged, however, as a result of a decision of the *en banc* Eighth Circuit invalidating Title II of the ADA as applied to the states, which expressly rejects the contrary view of six other circuits. *Alstook* v. *City of Maumelle*, No. 97-1825, 1999 U.S. App. LEXIS 16945 (8th Cir. July 23, 1999) (noting conflict with *Amos* v. *Maryland Dep't of Pub. Safety & Corr'l*

Servs., 178 F.3d 212 (4th Cir. 1999); *Kimel* v. *Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901, 902 (1999); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir.), *cert. denied*, 119 S. Ct. 58 (1998); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998); *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997)).

b. Certiorari should be granted on the issue of sovereign immunity not only because of the circuit conflict, but also because the Eighth Circuit's ruling in *Alstook* v. *City of Maumelle*, *supra*, is erroneous. In the ADA, Congress specifically abrogated states' Eleventh Amendment immunity. 42 USC 12202 ("A State shall not be immune under the eleventh amendment * * * from an action in Federal or State court of competent jurisdiction for a violation of this Act."). Congress validly exercised its authority under Section 5 of the Fourteenth Amendment in abrogating state sovereign immunity because "there [was] a congruence between the means used and the ends to be achieved," as required by this Court in *City of Boerne* v. *Flores*, 521 US 507, 528 (1997). The ADA is directed toward eliminating the discriminatory treatment of individuals with disabilities, the prevalence of which is amply documented in the statute's legislative history. *See generally Coolbaugh*, *supra*, 136 F.3d at 435. Given such widespread discrimination, the ADA does not provide "remedies so sweeping that they exceed the harms that [the statute is] designed to redress." *Clark*, *supra*, 123 F.3d at 1270. Moreover, given that "individuals with disabilities are a discrete and insular minority," *see* 42 USC 12101(a)(7), the ADA is necessarily limited in scope and accordingly valid. *See Kimel*, *supra*, 139 F.3d at 1433 (recognizing as valid ADA's abrogation of sovereign immunity on the basis of the limited group to whom ADA applies, while invalidating abrogation under ADEA).

c. This Court should grant certiorari to resolve the conflict over the validity of Title II as applied to states rather than

deferring the question. Although this Court's analysis of the ADEA in the *Florida Board of Regents* cases will be instructive regarding that question, they are unlikely to resolve the circuit conflict regarding the ADA. The ADEA and ADA differ substantially in several relevant respects, such that a finding that one statute does or does not constitute a valid waiver of state sovereign immunity likely will not be controlling in all circuits as to the other statute. In particular, the Eleventh Circuit itself in the consolidated ruling that gave rise to the *Florida Board of Regents* and *Dickson* petitions for certiorari invalidated the ADEA as applied to the states while *sustaining* the ADA. *See Kimel* v. *Florida Bd. of Regents*, 139 F.3d 1426, 1433 (1998). Given the substantial uncertainty in this area, the Court should grant certiorari and order expedited briefing so that this issue can be resolved under both the ADA and the ADEA.

Although Respondent did not assert sovereign immunity in the court of appeals, it retains the full right to do so in this Court. *Ford Motor Co.* v. *Department of Treasury*, 323 US 459, 466-67 (1945) ("The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."); *see also Edelman* v. *Jordan*, 415 US 651, 677-78 (1978). Lest there be any question, Petitioner expressly disclaims any right to object to Respondent raising sovereign immunity in this Court.[4]

This case is, moreover, the best vehicle to resolve the circuit conflict over whether Title II validly abrogates state sovereign immunity. Only this Petition presents the Court with the opportunity to address both the sovereign immunity ques-

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[4] Because the assertion of sovereign immunity would be consistent with the judgment below, Respondent is apparently not required to do so pursuant to a conditional cross-petition for certiorari, though that may be the safest course. *See* S. Ct. R. 12.

tion and also the important circuit conflict regarding whether Title II reaches employment discrimination.[5] This Court's resources are best utilized by reviewing both issues in a single case, rather than deferring the statutory construction of Title II to yet another case in the following Term.

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[5] If Respondent elects not to assert sovereign immunity, certiorari should be granted to resolve the circuit conflict over whether Title II reaches employment discrimination. That conflict will not be resolved if this Court holds in another case that Title II of the ADA does not validly abrogate state sovereign immunity because other public entities that cannot assert sovereign immunity, such as municipalities, will remain subject to Title II. *E.g.*, *Holbrook* v. *City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997); *Fobar* v. *City of Dearborn Heights*, 994 F. Supp. 878 (E.D. Mich. 1998); *Dominguez* v. *City of Council Bluffs*, 974 F. Supp. 732 (S.D. Iowa 1997); *Hernadez* v. *City of Hartford*, 959 F. Supp. 125 (D. Conn. 1997); *Bracciale* v. *City of Philadelphia*, Civ. A. No. 97-2464, 1997 U.S. Dist LEXIS 16757 (E.D. Pa. Oct. 29, 1997); *Motto* v. *City of Union City*, Civ. A. No. 95-5678, 1997 U.S. Dist LEXIS 23401 (D.N.J. Aug. 27, 1997); *Winfrey* v. *City of Chicago*, 957 F. Supp. 1014 (N.D. Ill. 1997); *Silk* v. *City of Chicago*, No. 95 C 0143, 1996 U.S. Dist. LEXIS 8334 (N.D. Ill. June 6, 1996); *Lundstedt* v. *City of Miami*, No. 93-1402-CIV-Marcus, 1995 U.S. Dist. LEXIS 21884 (S.D. Fla. Oct. 11, 1995); *Doe* v. *County of Milwaukee*, 871 F. Supp. 1072 (E.D. Wisc. 1995); *Dertz* v. *City of Chicago*, 912 F. Supp. 319 (N.D. Ill. 1995).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and, if Respondent asserts sovereign immunity, the Court should direct the parties to brief whether Congress has validly abrogated states' sovereign immunity from suit under Title II of the Americans With Disabilities Act.

Respectfully submitted,

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Dated: August 10, 1999.

SCOT L. ZIMMERMAN, Plaintiff,

v.

STATE OF OREGON DEPARTMENT OF JUSTICE, Defendant.

CV 97-959-PA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

October 31, 1997, Decided

Plaintiff Scot L. Zimmerman brings this employment discrimination action against defendant Oregon Department of Justice. Plaintiff alleges that defendant failed to accommodate his poor eyesight while training him to work as a child support agent. Plaintiff brings claims under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101 to 12213, and state law.

Defendant moves to dismiss for failure to state a claim and lack of subject matter jurisdiction. I grant the motion.

BACKGROUND

Plaintiff alleges that he began working for defendant on June 21, 1995, as a trial employee. Defendant discharged him on December 18, 1995, when he refused defendant's request that he remain on trial service.

After the state Employment Department denied unemployment benefits, plaintiff requested administrative review. The Employment Department initially denied plaintiff's claim, which included allegations of discrimination, on April

19, 1996.[1] After a hearing, the Employment Department again denied plaintiff's claim on June 19, 1996.

On December 18, 1996, plaintiff filed a complaint with the Oregon Bureau of Labor and Industries (BOLI). Johnston Affid., Attach. B.[2] Plaintiff later withdrew the BOLI complaint and filed this action on June 23, 1997.

STANDARDS

The court should not grant a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no facts in support of the claim. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). The court should construe the complaint in the light most favorable to the plaintiff. *Rosen* v. *Walters*, 719 F.2d 1422, 1424 (9th Cir. 1983).

A motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) may attack the substance of the complaint's jurisdictional allegations even though the allegations are formally sufficient. *St. Clair* v. *City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

DISCUSSION

I. Failure to File Timely Complaint With BOLI

Defendant moves to dismiss plaintiff's first two claims, which are under Title I of the ADA, 42 U.S.C. §§ 12111 to 12117, because plaintiff filed his complaint with BOLI more than 300 days after his alleged discharge. To bring an action in federal court for employment discrimination under Title I

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[1] I will accept these dates as true. Plaintiff asserts them in his response brief but not in the complaint.

[2] Plaintiff did not allege the date of the BOLI filing in his complaint. However, plaintiff does not dispute that the date was December 18, 1996. *See* Pltf.'s Memo. in Support at 2 ("Plaintiff also filed a Complaint with the Civil Rights Division of the State of Oregon on December 18, 1996.").

of the ADA, a person first must file a charge of discrimination with the federal Equal Employment Opportunity Commission (EEOC) or with a state or local agency able to grant relief from the unlawful employment practice. *See* 42 U.S.C. § 12117(a) (adopting Title VII's filing requirements, which are set forth in 42 U.S.C. § 2000e-5(e)(1)). There is a 180-day deadline for filing discrimination charges with the EEOC and a 300-day deadline for filing charges with the state or local agency. 42 U.S.C. § 2000e-*5*(e)(1). The filing deadline acts as a statute of limitations and failure to file a timely charge bars a subsequent action in federal court. *Delaware State College* v. *Ricks*, 449 U.S. 250, 256-57 (1980).

Here, plaintiff was discharged on December 18, 1995, and did not file a charge of discrimination with BOLI until December 18, 1996, well past the 300-day deadline. Plaintiff contends that he beat the deadline by filing his claim for unemployment benefits, which included allegations of discrimination, within 300 days.

I find no support for plaintiff's contention that filing a claim for unemployment benefits with the state Employment Department can be considered the equivalent of filing a claim with BOLI, even if the claim includes charges of discrimination. *Cf. Williams* v. *Board of Educ.*, 972 F. Supp. 248, 250 (S.D.N.Y. 1997) (filing complaint with U.S. Dep't of Education Office of Civil Rights not equivalent to filing with the EEOC or a state or local agency). Plaintiff does not dispute that BOLI, not the Employment Department, has a memorandum of understanding with the EEOC to accept discrimination claims. The Employment Department's jurisdiction is over unemployment insurance and compensation, not discrimination against disabled employees. *Compare* ORS 657.601 (legislature established Employment Department to "administer the unemployment laws," "provide for the operation of a state-wide employment service," manage an information system on the state labor market, and "provide child care advocacy . . .") *with* ORS 659.435 (legislature

grants Commissioner of BOLI enforcement powers to correct discrimination against disabled persons).

Plaintiff also has not shown grounds for equitable tolling. *See Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (courts have allowed equitable tolling when the claimant filed defective pleading during statutory period or was induced by the defendant's misconduct into missing the filing deadline, but not when the claimant fails to exercise due diligence); *Baldwin County Welcome Center* v. *Brown*, 466 U.S. 147, 151-52 (1984) (claimant who fails to act diligently cannot invoke equitable principles to excuse lack of diligence). Plaintiff's first two claims must be dismissed for failure to file a timely complaint with BOLI.

II. Employment Discrimination Claim under Title II of the ADA

Plaintiff's third claim is under Title II of the ADA, 42 U.S.C. §§ 12131 to 12134. Defendant moves to dismiss, contending that Title II does not create a cause of action for employment discrimination.

The Ninth Circuit has not addressed this issue. The Justice Department interprets Title II as prohibiting employment discrimination,[3] while courts addressing the issue are split, with a majority agreeing with the Justice Department. *See Bledsoe* v. *Palm Beach Soil and Water Conservation Dist.*, 942 F. Supp. 1439, 1443 (S.D. Fla. 1996) (collecting cases and concluding that although a majority hold that Title II creates a cause of action for employment discrimination, majority view is inconsistent with the ADA); *Dominguez* v. *City of Council Bluffs*, 974 F. Supp. 732, 1997 WL 484647, at *4 (S.D. Iowa 1997) (noting split of authority and following majority view).

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[3] 28 C.F.R. § 35.140(a) ("No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.").

I reject plaintiff's interpretation of Title II because it is inconsistent with the structure of the ADA as a whole. In Title I, Congress created a comprehensive scheme prohibiting employment discrimination. In Title II, headed "Public Services," Congress prohibited governments from discriminating against disabled persons in providing services such as public transportation or parks. *See* 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity."); *Bledsoe*, 942 F. Supp. at 1443-44. Allowing employment discrimination claims under Title II would make Title I almost completely redundant as applied to public employees.[4] After establishing a comprehensive statutory scheme in Title I to prohibit discrimination by both public and private employers, why would Congress then create a vague implied remedy for employment discrimination, available only to public employees? *But see Winfrey* v. *City of Chicago*, 957 F. Supp. 1014, 1023 (N.D. Ill. 1997) (speculating that Congress may have considered notice of employees' claims unnecessary for public employers and concluding that majority view not "so absurd as to require a different construction of the statute"). Public employees would have no reason to bring discrimination claims under Title I if Title II allowed them to take claims directly to federal court without exhausting administrative remedies. *Bledsoe*, 942 F. Supp. at 1445.

The wording of Title II also does not support plaintiff's argument. As courts on both sides of the dispute have noted, Title II does not address employment. *Bledsoe*, 942 F. Supp. at 1444; *Petersen* v. *University of Wisconsin Bd. of Regents*, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993) (coverage of em-

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[4] Title I applies to employers with fifteen or more employees, while Title II applies to all governmental entities, regardless of size or number of employees.

ployment discrimination "is not obvious from the plain language"; finding coverage based on Justice Department rule). One could broadly construe the phrase "services, programs, or activities of a public entity" to include employment. However, that reading ignores Title I's specific coverage of employment discrimination. *See Decker* v. *University of Houston*, 970 F. Supp. 575, 578 (S.D. Tex. 1997).

Plaintiff argues that I should accept the Justice Department's interpretation of Title II. However, courts are the final authorities on statutory construction, and a court must reject an agency construction that is inconsistent with the statutory mandate. *Vance* v. *Hegstrom*, 793 F.2d 1018, 1023 (9th Cir. 1986). The Justice Department's regulations are inconsistent with Title II and the entire ADA. *See Bledsoe*, 942 F. Supp. at 1448-49.

I conclude that Title II does not cover employment discrimination. Accepting plaintiff's position would create a "completely bewildering" statutory scheme:

> Both Title I and Title[] II apply to employment, although Title II says nothing at all on the subject and Title I lays out a comprehensive scheme to deal with employment issues; Title I says an employer must hire 15 employees to be sued for employment discrimination, but you can get around this under Title II if your employer is an arm of the State; Title I says you must exhaust administrative remedies, but you can ignore this requirement too if you are employed by the State. If this is really what Congress meant, then the ADA surely must rank as one of the great drafting debacles of recent times.

Bledsoe, 942 F. Supp. at 1445-46. Plaintiff's third claim must be dismissed for failure to state a claim.

III. Eleventh Amendment Immunity

Defendant moves to dismiss plaintiff's fourth claim, which is under ORS 659.425, contending that the Eleventh

Amendment bars the claim from being heard in federal court. I agree.

The Eleventh Amendment protects a state from suit by its own citizens in federal court. *Clark* v. *State of California*, 123 F.3d 1267, 1269, 1997 WL 525518, at *1 (9th Cir. 1997). A state may lose its Eleventh Amendment immunity in two ways: Congress can abrogate it by statute, or the state itself may choose to waive it. *Id.*

Plaintiff argues, correctly, that Congress abrogated Oregon's Eleventh Amendment immunity for claims brought under the ADA. *See* id. at *1-2. However, that abrogation applies only to claims under the ADA. The potential for supplemental federal jurisdiction over state law claims cannot abrogate a state's Eleventh Amendment immunity.

The other exception to Eleventh Amendment immunity, waiver by the state, also does not apply here. The court may find a waiver only when expressly stated or "by such overwhelming implication" as to leave no other reasonable interpretation possible. *See Micomonaco* v. *State of Washington*, 45 F.3d 316, 319 (9th Cir. 1995). "For a state statute to constitute waiver of Eleventh Amendment immunity, the statute at issue must specify the state's intention to be sued in federal court, because the state has a constitutional interest in where it may be sued." *Id.* The statute at issue here contains no waiver, express or implied, of Eleventh Amendment immunity. I dismiss plaintiff's state law claim for lack of subject matter jurisdiction.

CONCLUSION

Defendant's motion to dismiss (# 8) is granted.

DATED this 31st day of October, 1997.

OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

SCOT L. ZIMMERMAN, Plaintiff-Appellant,

v.

STATE OF OREGON
DEPARTMENT OF JUSTICE, Defendant-Appellee.

No. 97-36101

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

March 18, 1999, Filed

Plaintiff brought this action claiming, in part, that defendant's employment practices discriminated against him in violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, *et seq*. The district court dismissed the action, holding that Title II of the ADA does not apply to employment. Addressing this issue of first impression for the Ninth Circuit, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because this is an appeal from the dismissal of an action pursuant to Fed. R. Civ. P. 12(b)(6), we accept as true the facts alleged in the complaint. *Associated Gen. Contractors of Am.* v. *Metropolitan Water Dist.*, 159 F.3d 1178, 1181 (9th Cir. 1998).

On January 21, 1995, defendant hired plaintiff on a trial basis as a child support agent. Plaintiff suffers from a disabling eye condition that renders him visually impaired. During his employment, plaintiff asked that defendant reasonably accommodate his disability. Defendant refused and thereafter retaliated against plaintiff. Finally, on December 18, 1995, defendant fired plaintiff.

On June 23, 1997, plaintiff filed this action alleging that defendant had violated Titles I and II of the ADA and a similar state anti-discrimination statute. *Zimmerman* v. *Oregon Dep't of Justice*, 983 F. Supp. 1327, 1328 (D. Ore. 1997). Defendant moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b)(6). *Id.*

The district court first dismissed plaintiff's Title I claims, holding that plaintiff had failed to file a timely charge with the Equal Employment Opportunity Commission (EEOC). *Id.* at 1328-29. The court also dismissed plaintiff's state law claim, holding that defendant has Eleventh Amendment immunity. *Id.* at 1330-31. On appeal, plaintiff does not challenge either of those rulings.

Finally, the court dismissed plaintiff's Title II claim, holding that Title II does not apply to employment. *Id.* at 1329-30. The court acknowledged that it is possible to interpret the words of Title II broadly to cover employment. *Id.* at 1330. However, the court relied on contextual clues to reject that interpretation:

> I reject plaintiff's interpretation of Title II because it is inconsistent with the structure of the ADA as a whole. In Title I, Congress created a comprehensive statutory scheme prohibiting employment discrimination. In Title II, headed "Public Services," Congress prohibited governments from discriminating against disabled persons in providing services such as transportation or parks. Allowing employment discrimination claims under Title II would make Title I almost completely redundant as applied to public employees. After establishing a comprehensive statutory scheme in Title I to prohibit discrimination by both public and private employers, why would Congress then create a vague implied remedy for employment discrimination, available only to public employees? Public employees would have no reason to bring discrimination claims under Title I if Title II al-

> lowed them to take claims directly to federal court without exhausting administrative remedies.

Id. at 1329-30 (footnote and citations omitted). Plaintiff brings this timely appeal to challenge that decision.

STANDARD OF REVIEW

We review de novo the district court's dismissal of an action pursuant to Fed. R. Civ. P. 12(b)(6). *Steckman* v. *Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

DISCUSSION

A. Statutory Overview

The ADA contains five titles: Employment (Title I), Public Services (Title II), Public Accommodations and Services Operated by Private Entities (Title III), Telecommunications (Title IV), and Miscellaneous Provisions (Title V).[5] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 327-28 (1990). As those headings suggest, Title I applies specifically to employment:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

Congress has defined "covered entity" to include state employers such as defendant. The term "covered entity" includes an "employer." 42 U.S.C. § 12111 (2). In turn, "employer" includes a "person engaged in an industry affecting commerce who has 15 or more employees." 42 U.S.C. § 12111(5)(A). Completing the picture of who is covered, the

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[5] As codified, the telecommunications title is not a separate subchapter.

statute defines "person" and "industry affecting commerce" to include a governmental "industry, business or activity." *See* 42 U.S.C. § 12111(7) ("The terms 'person' . . . and 'industry affecting commerce', shall have the same meaning given such terms in section 2000e of this title."); 42 U.S.C. § 2000e(a) ("The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions . . . ."; 42 U.S.C. § 2000e(h) ("The term 'industry affecting commerce' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes . . . any governmental industry, business, or activity.").

Although Congress generally included governmental employers in Title I, it exempted the federal government from that Title. *See* 42 U.S.C. § 12111(5)(B) ("The term 'employer' does not include . . . the United States, a corporation wholly owned by the government of the United States, or an Indian tribe . . . ."). That being so, by including governmental employers in Title I, but at the same time excluding federal governmental employers, Congress was referring only to state and local governmental employers such as defendant.

Neither party disputes that Title I ordinarily would apply to plaintiff's action. However, Title I requires an employee first to file a charge with the EEOC in a timely manner. *See* 42 U.S.C. § 12117(a) (incorporating the charge requirement from Title VII of the Civil Rights Act of 1964, as amended). Plaintiff failed to satisfy that requirement and, thus, is left to argue that Title II also applies to state employment; Title II does not require him to file a charge with the EEOC.

B. Chevron deference

Title II is the "Public Services" title of the ADA. Congress required the Attorney General to promulgate regulations implementing Title II. *See* 42 U.S.C. § 12134(a). Pursuant to that grant of authority, the Attorney General has determined that Title II applies to employment:

> No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

28 C.F.R. § 35.140(a) (1998).

Under these circumstances, *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), governs our review of 28 C.F.R. § 35.140(a) and Title II. *See*, e.g., *Does 1-5* v. *Chandler*, 83 F.3d 1150, 1153 (9th Cir. 1996) (applying Chevron deference to other Title II regulations). Although the parties agree that *Chevron* applies, not surprisingly, they disagree about the outcome of a *Chevron* analysis.

In *Chevron*, the Supreme Court devised a two-step process for reviewing an administrative agency's interpretation of a statute that it administers. *See Chevron*, 467 U.S. at 842-44. *See also Bicycle Trails Council of Marin* v. *Babbitt*, 82 F.3d 1445, 1452 (9th Cir. 1996) ("The Supreme Court has established a two-step process for reviewing an agency's construction of a statute it administers."). Under the first step, we employ our "traditional tools of statutory construction" to determine whether Congress has expressed its intent unambiguously on the question before the court. *Chevron*, 467 U.S. at 843 n.9. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If, instead, Congress has left a gap for the administrative agency to fill, we proceed to step two. *See id.* at 843. At step two, we must uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

Plaintiff and the Attorney General, as *amicus*, argue that Title II is ambiguous and thus requires us to defer to the Attorney General's regulation. Defendant, to the contrary, argues that Title II expresses Congress' intent unambiguously.

We agree with defendant. Congress unambiguously expressed its intent for Title II not to apply to employment. That being so, we end our inquiry at the first step of the *Chevron* analysis and accord the Attorney General's regulation no weight. *See National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) ("Because we conclude that Congress has made it clear that the same common bond of occupation must unite each member of an occupationally defined federal credit union, we hold that the NCUA's contrary interpretation is impermissible under the first step of Chevron.") (emphasis in original); *Sierra Club* v. *United States Envtl. Protection Agency*, 118 F.3d 1324, 1327 (9th Cir. 1997) ("Congress has spoken clearly on the subject and the regulation violates the provisions of the statute. Our inquiry ends at the first prong of Chevron."). *See also Patterson* v. *State of Ill., Dep't of Corrections*, 1999 U.S. Dist. LEXIS 1430, No. 98-4005, 1999 WL 68373, at *8 (C.D. Ill. Jan. 26, 1999) (refusing to defer to 28 C.F.R. § 35.140(a), because "Congress clearly intended for employment disputes, whether arising from public or private employment, to be brought only under Title I of the ADA"); *Decker* v. *University of Houston*, 970 F. Supp. 575, 578 (S.D. Tex. 1997) (refusing to defer to 28 C.F.R. § 35.140(a)), *aff'd*, 159 F.3d 1355 (5th Cir. 1998) (Table).

C. Wording of Title II

Using our "traditional tools of statutory construction," *Chevron*, 467 U.S. at 843 n.9, "when interpreting a statute, [we] look[ ] first to the words that Congress used." *Sanchez* v. *Pacific Powder Co.*, 147 F.3d 1097, 1099 (9th Cir. 1998). "Rather than focusing just on the word or phrase at issue, [we] look[ ] to the entire statute to determine Congressional intent." *Id.*

Title II's operative section provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such

> disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The term "public entity" means "any State or local government" or "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A) & (B).

As is evident, that section contains two clauses. First, 42 U.S.C. § 12132 says that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity[.]

Congress did not define any of the terms in that clause except "public entity" and "qualified individual with a disability." *See* 42 U.S.C. § 12131 (defining Title II's terms). "When a statute does not define a term, we generally interpret that term by employing the ordinary, contemporary, and common meaning of the words that Congress used." *United States* v. *Iverson*, 162 F.3d 1015, 1022 (9th Cir. 1998).

A common understanding of the first clause shows that it applies only to the "outputs" of a public agency, not to "inputs" such as employment. *See Decker*, 970 F. Supp. at 578 ("The phrase 'services, programs, and activities,' . . . understood as a whole, focuses on a public entity's outputs rather than inputs.") (citation and internal quotation marks omitted). First, employment by a public entity is not commonly thought of as a "service, program, or activity of a public entity." Second, the "action" words in the sentence presuppose that the public entity provides an output that is generally available, and that an individual seeks to participate in or receive the benefit of such an output.

Consider, for example, how a Parks Department would answer the question, "What are the services, programs, and activities of the Parks Department?" It might answer, "We

operate a swimming pool; we lead nature walks; we maintain playgrounds." It would not answer, "We buy lawnmowers and hire people to operate them." The latter is a means to deliver the services, programs, and activities of the hypothetical Parks Department, but it is not itself a service, program, or activity of the Parks Department.

Similarly, consider how a member of the public would answer the question, "What are the services, programs, and activities of the Parks Department in which you want to participate, or whose benefits you seek to receive?" The individual might answer, "I want to participate in the Wednesday night basketball league, or find out about the free children's programs for the summer months." The individual would not logically answer, "I want to go to work for the Parks Department."

We conclude, then, that the wording of the first clause does not suggest that Congress intended for Title II to apply to employment.[6] Almost all other courts have, at least implicitly, adopted the foregoing interpretation.[7] In particular, although they have held that Title II applies to employment, they have not done so because of the wording of the first clause. Instead, the courts that have considered that wording have held that it does not apply to employment. *See, e.g., Decker*, 970 F. Supp. at 578 (so holding). *See also Larramendy* v. *San Mateo County Transit Dist.*, 1998 U.S. Dist. LEXIS 11711, No. 97-3436, 1998 WL 456283, at *3 n.1 (N.D. Cal. July 30, 1998) (holding that Title II does not apply to the plaintiff's employment action, because the "plaintiff is not claiming that he was trying to avail himself of a public service, such as use of a public bus, administered by the Dis-

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[6] If there were any doubt about the meaning of the first clause, it would be resolved by resort to the statutorily defined term, "qualified individual with a disability," which we discuss in the text below.

[7] The only exception appears to be *Dominguez* v. *City of Council Bluffs, Iowa*, 974 F. Supp. 732, 736-37 (S.D. Iowa 1997).

trict; instead, he is claiming that the District, as employer, violated his rights as an employee"); *Iskander* v. *Rodeo Sanitary Dist.*, 1995 U.S. Dist. LEXIS 1620, No. C-94 0479-SC, 1995 WL 56578, at *9 (N.D. Cal. Feb. 7, 1995) ("This section concerns the rendering of services to the public by public entities, *i.e.*, public transportation. Title II is inapplicable to the District's composition of employees.") (citation and footnote omitted), *aff'd on other grounds*, 121 F.3d 715 (9th Cir. 1997) (Table).

The second clause of 42 U.S.C. § 12132 states that no qualified individual with a disability shall, by reason of such disability, . . . be subjected to discrimination by any such entity.

Some courts have held that the second clause is entirely independent from the first and that it prohibits any form of discrimination by a public entity. *See Bledsoe* v. *Palm Beach County Soil & Water Conserv. Dist.*, 133 F.3d 816, 822 (11th Cir.) ("The language of Title II's antidiscrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities,' of [a public entity]. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.") (citation and internal quotation marks omitted), *cert. denied*, 142 L. Ed. 2d 57, 119 S. Ct. 72 (1998); *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997) (same) (not an employment action). *See also Alberti* v. *City & County of San Francisco Sheriff's Dep't*, 32 F. Supp. 2d 1164, 1998 WL 954876, at *4 (N.D. Cal. 1998) ("The statute's construction evinces congressional intent to keep the term 'or be subject to such discrimination' broad. Although Congress did not insert the word 'employment' it could be read to include all forms of discrimination . . . ."); *Downs* v. *Massachusetts Bay Transp. Auth.*, 13 F. Supp. 2d 130, 135 (D. Mass. 1998) ("The [defendant] focuses exclusively on the access to the 'services, programs, or activities' of public entities guaranteed by the first prong of this section, and disre-

gards the general prohibition on discrimination provided by the second prong.").

Under that interpretation, Title II would be broad enough to include employment discrimination by a public entity. We do not, however, agree with that interpretation for two reasons: (1) it takes the key phrase out of context, and (2) it conflicts with Ninth Circuit precedent.

Initially, the placement of the second clause in the single sentence that forms 42 U.S.C. § 12132 suggests that the second clause relates back to the same "services, programs, or activities" of a public entity that the first clause covers. Moreover, of course, Title II pertains to "Public Services." *See Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) ("The title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (citation and internal quotation marks omitted). Although placement of the second clause and the heading of the section do not, by themselves, unambiguously indicate Congress' intent, the remainder of Title II does.

To prevail on a Title II claim, including a claim under the second clause, a plaintiff must prove that he or she is a "qualified individual with a disability." *See* 42 U.S.C. § 12132 (so providing); *Weinreich* v. *Los Angeles County Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997) ("To prove a public program or service violates Title II of the ADA, a plaintiff must show . . . [that] he is a 'qualified individual with a disability.'"), *cert. denied*, 139 L. Ed. 2d 324, 118 S. Ct. 423 (1998). Title II defines that requirement:

> As used in this subchapter:
>
> The term "qualified individual with a disability" means *an individual with a disability* who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, *meets the essential eligibility requirements*

for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2) (emphasis added). A plaintiff is not "qualified" to bring any Title II claim unless he or she "meets the essential eligibility requirements" of a government service, program, or activity provided by a public entity. The second clause of § 12132 therefore must relate to a government service, program, or activity; otherwise a plaintiff is not "qualified" to bring a claim under that clause. Using the ordinary meaning of the phrase emphasized above, we return to what we said about the first clause of § 12132. Obtaining or retaining a job is not "the receipt of services," nor is employment a "program[ ] or activity provided by a public entity." Again, the "action" words in the statute assume a relationship between a public entity, on the one hand, and a member of the public, on the other. The former provides an output that the latter participates in or receives.

This court already has hinted at the foregoing interpretation of the second clause. In *Crowder* v. *Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), this court held that Congress' placement of the word "or" between the two clauses in 42 U.S.C. § 12132 indicates its intent to prohibit two things: "Due to the insertion of 'or' between exclusion from/denial of benefits on the one hand and discrimination by a public entity on the other, we conclude Congress intended to prohibit two different phenomena." *Id.* at 1483. In particular, Congress intended for the second clause to prohibit intentional discrimination, whereas it intended for the first clause to prohibit disparate treatment of the disabled. *See id.* ("Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability.").

Crowder, thus, suggests that both clauses prohibit discrimination by a public entity in providing its services, programs and activities. The clauses differ only in their method of prohibiting discrimination. *See, e.g., id.* at 1483-84 ("Few

would argue that architectural barriers to disabled persons such as stairs, or communication barriers such as the preference for the spoken word, are intentionally discriminatory. Yet, stairs can deny the wheelchair-bound access to services provided on the second floor of a government building; and communicating only by the spoken word can deny deaf persons the ability to find out that it is the second floor where they must go to obtain the services they seek.").

In summary, the second clause of 42 U.S.C. § 12132, like the first, prohibits discrimination only in a public entity's "outputs." Thus, the wording of 42 U.S.C. § 12132 does not permit an inference that Congress intended for Title II to apply to employment.

D. Structure of the ADA

Even were the wording of Title II ambiguous, by itself, the structure of the ADA as a whole unambiguously demonstrates that Congress did not intend for Title II to apply to employment. *See National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992) ("In ascertaining whether the agency's interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole.").

The structure of the ADA demonstrates congressional intent in five main ways: (1) Congress placed employment-specific provisions in Title I, which it labeled "Employment," whereas Congress placed no employment-related provisions in Title II, which it labeled "Public Services." (2) Congress defined "qualified individual with a disability" differently in Title I than in Title II. In Title I, a person is "qualified" if the person can work, whereas in Title II a person is "qualified" if the person is eligible to receive services or participate in a publicly provided program. (3) Allowing employment discrimination claims under Title II would make Title I redundant as applied to public employees and would eviscerate the procedural requirements of Title I for those employees. (4)

Congress gave regulatory authority to different agencies for Title I and Title II. Congress gave authority over Title I to the EEOC, the agency that administers most federal employment-related statutes. (5) Congress expressly linked the employment-related provisions of the Rehabilitation Act to Title I of the ADA, not to Title II. We discuss each of those aspects of the ADA's structure in turn.

First, Title I contains detailed and comprehensive employment provisions. Title II, on the other hand, is completely devoid of any employment provisions. For example, in Title I ("Employment"), the term "qualified individual with a disability" speaks to a person's qualifications to work. By contrast, as discussed above, in Title II ("Public Services") a "qualified individual with a disability" means a person who is eligible to receive services or to participate in a publicly provided program or activity. *Compare* 42 U.S.C. § 12111(8) (Title I):

> As used in this subchapter:
>
> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

with 42 U.S.C. § 12131(2) (Title II):

> As used in this subchapter:
>
> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or

> transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Likewise, in Title I, "reasonable accommodation" addresses specifically the needs of the disabled in the workplace. Title II does not contain a similar definition. *Compare* 42 U.S.C. § 12111(9) (Title I):

> As used in this subchapter:
>
> The term "reasonable accommodation" may include -
>
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

with 42 U.S.C. § 12131 (Title II) (using the undefined term "reasonable modification").

Congress thus crafted extensive employment-specific provisions in Title I. It omitted any mention of employment in Title II. In that circumstance, we must give effect to the different wording and different focus of the two provisions. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted). *See also Patterson*, 1999 WL 68373, at *7 (relying, in part, on the different definitions of "qualified individual with a disability" to hold that

"Congress never intended for Title II to cover employment disputes").

We turn next to the principle of giving full effect to each provision of a statute. Congress consciously and expressly chose to include the employment practices of state and local governments in Title I. To hold that Title II also governs their employment practices would render Congress' special effort to ensure their inclusion in Title I superfluous. Public employees could avoid the procedural requirements of Title I by pursuing all their claims under Title II. This court generally refuses to interpret a statute in such a manner. *See Northwest Forest Resource Council* v. *Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) ("We have long followed the principle that statutes should not be construed to make surplusage of any provision.") (citation and internal quotation marks omitted).

Titles I and II of the ADA incorporate their remedies and procedures from different acts: Title I incorporates provisions of Title VII of the Civil Rights Act of 1964, as amended,[8] while Title II incorporates provisions of the Rehabilitation Act.[9] Title I thereby incorporates Title VII's charge requirement, whereas Title II incorporates the Rehabilitation Act's provisions, which do not require an employee to pursue any administrative relief. *See Smith* v. *Barton*, 914 F.2d 1330,

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[8] *See* 42 U.S.C. § 12117(a) (Title I) ("The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5 [charge requirement], 2000e-6, 2000e-8 and 2000e-9 of this title [Title VII] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.").

[9] *See* 42 U.S.C. § 12133 (Title II) ("The remedies, procedures, and rights set forth in section 794a of Title 29 [the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.").

1338 (9th Cir. 1990) ("Private plaintiffs suing under section 504 [of the Rehabilitation Act] need not first exhaust administrative remedies."). Allowing employment claims under Title II would render the charge requirement completely superfluous for public employees.

Next, we consider Congress' choices respecting delegation of authority to the Executive Branch. Titles I and II delegate the responsibility to promulgate regulations to different agencies. Title I requires the EEOC to issue regulations interpreting that title. 42 U.S.C. § 12116. Title II, on the other hand, gives that power to the Attorney General. 42 U.S.C. § 12134(a). If both Title I and II apply to disability discrimination in employment, then it is possible for state and local governments to be subjected to conflicting regulations.

Congress was aware of the problem that conflicting regulations could create. In response to that potential problem, Congress ordered the agencies charged with enforcing Title I (the EEOC) and the Rehabilitation Act of 1973 (the Attorney General) to "develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973." 42 U.S.C. § 12117(b). Congress' failure to include a similar provision for coordination between Titles I and II is evidence that it did not intend for the Attorney General to have any power over employment under Title II; it never envisioned that there could be a conflict.

Finally, the ADA's linkage of Title I and the Rehabilitation Act establishes that Congress thought that the ADA's employment-related provisions were embodied in Title I, not Title II. Congress made this linkage even stronger in 1992 when it amended the Rehabilitation Act to incorporate employment-related standards from Title I, not Title II:

> The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.[10]

29 U.S.C. § 794(d) (emphasis added).[11]

In conclusion, when viewed as a whole, the text, context and structure of the ADA show unambiguously that Congress did not intend for Title II to apply to employment. Under these circumstances, we do not resort to legislative history, and we do not defer to the Attorney General's regulation. *See, e.g., Sloan* v. *West*, 140 F.3d 1255, 1261 (9th Cir. 1998) ("If the intent of Congress is clear from the face of the statutory language, we must give effect to the unambiguously expressed Congressional intent."); *Moyle* v. *Director, Office of Workers' Comp. Programs*, 147 F.3d 1116, 1120 (9th Cir. 1998) ("When interpreting a statute, we ordinarily first look to the plain meaning of the language used by Congress. But if the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpretation.") (citation and internal quotation marks omitted), *petition for cert. filed*, 67 U.S.L.W. 3394 (U.S. Dec. 3, 1998) (No. 98-927).[12]

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[10] The other cited sections of the ADA are among the "Miscellaneous Provisions."

[11] Ordinarily, the 1992 Congress' interpretation of a 1990 statute would provide no guidance. However, 1992 was the first year in which the ADA took effect, so the 1992 Congress was the first Congress that had to address the interrelationship between the ADA and the Rehabilitation Act.

[12] The Eleventh Circuit in Bledsoe stated that "extensive legislative commentary regarding the applicability of Title II to employment discrimination, however, is so pervasive as to belie any contention that Title II does not apply to employment actions." *Bledsoe*, 133 F.3d at 821. We again part ways with the Eleventh Circuit. We have reviewed the legislative

E. Rehabilitation Act

1. Express incorporation

Plaintiff and *amicus* argue that Title II expressly incorporates the Rehabilitation Act's prohibition on employment discrimination. We disagree.

Plaintiff and *amicus* rely, first, on 42 U.S.C. § 12133, which provides:

> The remedies, procedures, and rights set forth in section 794a of Title 29 [the Rehabilitation Act] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

(Emphasis added.) Because one of the "rights" in the Rehabilitation Act is the right to be free from employment discrimination, plaintiff and amicus argue, 42 U.S.C. § 12133 incorporates that "right" into Title II.

However, 42 U.S.C. § 12133 incorporates only one section of the Rehabilitation Act: 29 U.S.C. § 794a. That section includes the Rehabilitation Act's procedural rights, not its substantive rights. Congress' choice to incorporate one section of the Rehabilitation Act, which provides certain procedures, does not demonstrate that Congress also intended to incorporate the rest of the Rehabilitation Act's substance. Indeed, it demonstrates precisely the opposite. *See, e.g., Longview Fibre Co.* v. *Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992) ("No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated. In this case, *expressio unius est exclusio alterius*.").

Second, plaintiff and amicus rely on 42 U.S.C. § 12134(b), which provides in part:

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history thoroughly and find it ambiguous at best. More importantly, we are bound by what Congress actually enacted.

> Regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of Title 29.

They argue that, because 28 C.F.R. § 41.1 *et seq.* (1989) prohibited employment discrimination, the foregoing provision demonstrates Congress' intent to incorporate that prohibition into Title II. *See* 28 C.F.R. §§ 41.52-41.55 (so prohibiting). *See also* 28 C.F.R. § 35.140 App. A ("The statutory language of section [12134] of the ADA requires the Department to issue a regulation that is consistent with the ADA and the Department's coordination regulation under section 504, 28 C.F.R. part 41. The coordination regulation specifically requires nondiscrimination in employment."). We again disagree.

Unlike 42 U.S.C. § 12133, 42 U.S.C. § 12134(b) does not suggest that Congress intended to incorporate any provisions from the Rehabilitation Act into Title II. Instead, 42 U.S.C. § 12134(b) merely requires the Attorney General to ensure that the regulations are "compatible" to the extent that they overlap. *See, e.g.*, Webster's Third New Int'l Dictionary 484 (unabridged ed. 1993) ("Consistently [means] . . . compatibly . . . congruously . . . [or] in harmony with."). The regulations in question embrace four main topics: They define terms such as "handicap" or "disability"; list types of prohibited discrimination in programs, activities, and services; list types of prohibited discrimination in employment; and set accessibility standards. Because of the several topics, of which employment is but one, we infer that Congress intended employment to be an area of regulatory overlap.

We conclude that Congress did not expressly incorporate the substantive employment provisions of the Rehabilitation Act into Title II.

2. Implied incorporation

Even if Title II of the ADA does not expressly incorporate the Rehabilitation Act's substantive employment rights, plaintiff and *amicus* argue, it impliedly incorporates those rights. We are not persuaded.

Congress did model Title II on the Rehabilitation Act. *See Weinreich*, 114 F.3d at 978 ("Title II of the ADA was expressly modeled after Section 504 of the Rehabilitation Act . . . ."). Plaintiff and amicus argue that, because Title II merely expands the reach of the Rehabilitation Act, Title II must also apply to employment.

Unlike the Rehabilitation Act, Title II applies to all public entities, whether or not they receive federal financial assistance. Thus, in some respects, it is true that Congress broadened the provisions of the Rehabilitation Act in Title II.

On the other hand, the Rehabilitation Act also applied (and still does apply) to private entities that receive federal financial assistance. *See* 29 U.S.C. § 794(b) ("The term 'program or activity' means all operations of . . . an entire corporation, partnership, or other private organization . . . .") (emphasis added). *See also Jacobson* v. *Delta Airlines, Inc.*, 742 F.2d 1202, 1209 (9th Cir. 1984) (holding that private airlines are subject to the Rehabilitation Act if they receive federal subsidies). Congress did not make private entities subject to Title II; instead, they are subject only to Titles I, III, and V. In other words, Congress also limited the reach of the Rehabilitation Act in Title II.

In the circumstances, Congress' use of the Rehabilitation Act as a model for Title II does not, standing alone, evidence Congress' intent to incorporate the employment provisions from that Act into Title II, as distinct from Title I. Rather, we must examine carefully the similarities and differences between the two statutes to determine whether Congress had such an intent.

Plaintiff and *amicus* note that Title II contains wording that is similar to the wording found in § 504 of the Rehabilitation Act. Before the enactment of the ADA, the Supreme Court had held that § 504 applies to employment. *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 631-34 (1984). Plaintiff and *amicus* argue that we must interpret Title II, likewise, to apply to employment. *See, e.g.*, *Bledsoe*, 133 F.3d at 821 ("It is significant that Congress intended Title II to work in the same manner as Section 504 of the Rehabilitation Act, because Section 504 was so focused on employment discrimination that Congress enacted subsequent legislation to clarify that Section 504 applied to other forms of discrimination in addition to employment discrimination.") (citing *Consolidated Rail*, 465 U.S. at 626-32); *Alberti*, 1998 WL 954876, at *5 ("Congress modeled Title II of the ADA after the Rehabilitation Act. . . . When Congress passed the ADA in 1990, it was clearly established that the Rehabilitation Act covers employment discrimination.") (citing *Consolidated Rail*, 465 U.S. at 624); *Downs*, 13 F. Supp. 2d at 135 ("Language in § 504 very similar to that of 42 U.S.C. § 12132 (and similarly devoid of express reference to employment) had long been understood to prohibit employment discrimination.") (citing *Consolidated Rail*, 465 U.S. at 632); *Ethridge* v. *Alabama*, 847 F. Supp. 903, 906 (M.D. Ala. 1993) ("A primary purpose of § 12131 was to extend the reach of § 504 of the Rehabilitation Act of 1973 . . . Section 504, including its amendments and regulations, clearly applies to employment discrimination.") (citing *Consolidated Rail, 465 U.S. at 626).*

The answer is not so simple, for four reasons. (1) Textually, Congress did not borrow the wording of § 504 verbatim when it drafted Title II, although the phrasing of the two statutes is similar. (2) Contextually, surrounding sections of the Rehabilitation Act relate explicitly to employment, whereas no section of Title II relates to employment. (3) The Congressional purpose to cover employment could not be carried out

under the Rehabilitation Act except by construing its sole operative provision, § 504, to encompass employment, whereas the Congressional purpose to cover employment is carried out in a separate operative provision of the ADA (Title I). (4) Congress has linked the Rehabilitation Act to Title I, but not Title II, of the ADA.

We turn first to the statutory text. "When a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase." *Long* v. *Director, Office of Workers' Comp. Programs*, 767 F.2d 1578, 1581 (9th Cir. 1985) (citation and internal quotation marks omitted). *See also Collings* v. *Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995) ("The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA."). That rule of interpretation makes sense, however, only when the new statute contains materially the same phrase as is found in the old statute. Here, Congress chose not to adopt the broad wording of the Rehabilitation Act.

When the Supreme Court interpreted § 504 of the Rehabilitation Act, that section provided in part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (1984) (emphasis added); *Consolidated Rail*, 465 U.S. at 632. The Rehabilitation Act's phrase "under any program or activity receiving Federal financial assistance" is

broader than Title II's phrase, "in . . . the services, programs, or activities of a public entity."

The focus of the emphasized phrase in § 504 of the Rehabilitation Act is the receipt of Federal financial assistance. *See Consolidated Rail*, 465 U.S. at 631-36 (discussing the meaning of the requirement that a program receive Federal financial assistance). Discrimination is prohibited under any program or activity that receives such assistance. This focus naturally encompasses the entire operation of the program or activity, for its federal funding may well flow into compensation for employees.

To the extent that there was any ambiguity about the breadth of that wording when the Supreme Court decided *Consolidated Rail*, Congress amended § 504 in 1988 to make its breadth clear. That amendment defined the term "program or activity" to include "all of the operations" of the entity.[13]

By contrast, the focus of Title II of the ADA is on the services, programs, or activities that a public entity provides. That is an outward-looking focus.

In summary, when Congress enacted the ADA, § 504's "under any program or activity" wording was very broad. Congress' decision to use a narrower phrase in Title II indicates its intent for Title II not to be coextensive with the Rehabilitation Act.

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[13] Title 29 U.S.C. § 794(b) provides in part:

> For the purposes of this section, the term "program or activity" means all of the operations of -
>
> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government[.]

Moreover, unlike Title II of the ADA, the Rehabilitation Act contained several employment-related provisions. For example, Congress limited the application of § 504 to an "otherwise qualified handicapped individual in the United States, as defined in section 706(7)." 29 U.S.C. § 794 (1984). In turn, 29 U.S.C. § 706(7) defines that term solely in relation to employment. *See* 29 U.S.C. § 706(7)(A) (1984) ("The term 'handicapped individual' means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment; and (ii) can reasonably be expected to benefit in terms of employability.") (emphasis added). *See also* 29 U.S.C. § 706(7)(B) (1984) ("For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.") (emphasis added).

In fact, one of Congress' express purposes in enacting the Rehabilitation Act was to "promote and expand employment opportunities in the public and private sectors for handicapped individuals." *See Consolidated Rail*, 465 U.S. at 626 (quoting 29 U.S.C. § 701(8) (1973)). These textual and contextual clues demonstrated that Congress intended for the Rehabilitation Act to apply to employment despite the absence of an express mention of employment in § 504 itself.

By contrast, Title II contains no employment-specific provisions. Congress placed all of those provisions in Title I. Unlike the ADA, the Rehabilitation Act has no separate title specifically governing employment. *See, e.g., Consolidated Rail*, 465 U.S. at 632 n.13 (contrasting the Civil Rights Act of 1964 because, "as the Court of Appeals observed, it was unnecessary to extend Title VI more generally to ban employ-

ment discrimination, as Title VII comprehensively regulates such discrimination").

The Supreme Court's interpretation of Title IX of the Education Amendments of 1972 (which the Supreme Court also has held applies to employment) highlights the effect of that difference in statutory structure. *See North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512 (1982) (construing Title IX). Title IX provides in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a) (emphasis added). As does the Rehabilitation Act, Title IX contains the phrase "under any . . . program or activity receiving Federal financial assistance," which is broader than the corresponding phrase in Title II of the ADA. The Supreme Court noted that the wording of Title IX was "broad" and that it "favored" inclusion of employees. *North Haven*, 456 U.S. at 520, 522. Even so, before concluding that Title IX covered employment, the Court reasoned:

> If we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language. Because [Title IX] neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these "persons" unless other considerations counsel to the contrary.

Id. at 521 (emphasis added) (citations and internal quotation marks omitted).

There is no need under the ADA to interpret Title II broadly "to give [the ADA] the scope that its origins dictate." Unlike both Title IX and the Rehabilitation Act, the ADA contains a detailed, separate employment discrimination title.

Title I protects nearly all state and local government employees even if Title II does not apply to employment. *See Bledsoe* v. *Palm Beach Soil & Water Conserv. Dist.*, 942 F. Supp. 1439, 1444 n.4 (S.D. Fla. 1996) ("The Court recognizes that the Supreme Court has construed similar language in the Rehabilitation Act to include employment. However, the Rehabilitation Act only applied to any 'program or activity,' and added that these were to be construed to include 'all operations' of the covered entities. The Court believes that by . . . creating an entire new section devoted to employment, Congress meant to bifurcate the ADA into one section dealing with public and private employment relationships, and one section dealing with government services.") (citation omitted), *rev'd*, 133 F.3d 816 (11th Cir.), *cert. denied*, 119 S. Ct. 72 (1998).[14]

Finally, as noted above, Congress amended the Rehabilitation Act to incorporate the employment provisions from Title I of the ADA. *See* 29 U.S.C. § 794(d) (quoted at p. 2345 above). Because Congress expressly linked the Rehabilitation Act's employment provisions to Title I (but not to Title II), "it would seem rather bizarre to find an employment cause of action in Title II of the ADA on the grounds that Title II is tied to the Rehabilitation Act, when the Rehabilitation Act itself ties its employment cause of action to Title I." *Bledsoe*, 942 F. Supp. at 1446.

In summary, the Rehabilitation Act does not provide a basis for interpreting Title II to apply to employment. To the contrary, the differences between that Act and Title II further support the conclusion that Congress did not intend for Title II to apply to employment.

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[14] As the citation shows, the Eleventh Circuit has reversed the district court's decision in Bledsoe. We cite the district court's decision for the strength of its reasoning and not the force of its authority.

F. Precedent

We are mindful that most courts have held that Title II applies to employment. Ordinarily, we would find it difficult to hold that the wording of a statute unambiguously indicates a contrary congressional intent in the face of such precedent. However, those courts generally have ignored the wording of Title II altogether,[15] including the definition of "qualified individual with a disability" from that Title and the surrounding words in 42 U.S.C. § 12132. Instead, they have: (1) assumed without analysis that Title II applies to employment,[16] (2) relied only on the Attorney General's regulation and the legislative history of the ADA, without discussion of the statutory text and context,[17] (3) relied on the Rehabilitation Act without

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[15] The major exception is the Eleventh Circuit's decision in *Bledsoe*. Like the cases listed infra at footnote 13, that court relied primarily on the ADA's legislative history and the Attorney General's regulation. *See Bledsoe*, 133 F.3d at 821-22. However, the court also justified its result with reference to the second clause of § 12132, which it described as a "'catch-all phrase that prohibits all discrimination by a public entity.'" *Id.* at 822 (citation omitted); *See also Alberti*, 1998 WL 954876, at *4 (relying on the second clause of § 12132); *Downs*, 13 F. Supp. 2d at 135 (relying on the second clause of § 12132). However, for reasons that we already have discussed, we do not think that this reading of the statutory text is correct.

[16] *See, e.g., Holmes* v. *Texas A & M Univ.*, 145 F.3d 681, 683-84 (5th Cir. 1998); *Doe* v. *University of Maryland Med. Sys.*, 50 F.3d 1261, 1264-65 & n.9 (4th Cir. 1995); *Motto* v. *City of Union City*, 1997 WL 816509, at *8 (D.N.J. Aug, 27, 1997); *Davoll* v. *Webb*, 943 F. Supp. 1289, 1297 (D. Colo. 1996); *Dertz* v. *City of Chicago*, 912 F. Supp. 319, 323-25 (N.D. Ill. 1995), *reconsidered in part on other grounds*, 1997 WL 85169 (Feb. 24, 1997); *Doe* v. *County of Milwaukee*, 871 F. Supp. 1072, 1074 (E.D. Wis. 1993); *Eisfelder* v. *Michigan Dept. of Natural Resources*, 847 F. Supp. 78, 83-84 (W.D. Mich. 1993); *Finley* v. *Giacobbe*, 827 F. Supp. 215, 219 n.3 (S.D.N.Y. 1993).

[17] *See, e.g., Hernandez* v. *City of Hartford*, 959 F. Supp. 125, 133 (D. Conn. 1997) ("On its face, Title II prohibits discrimination in 'public services'. A plain reading of the section does not reveal whether Title II covers employment discrimination addressed more specifically in Title I. The regulations under and the legislative history of ADA Title II make it

analyzing whether Congress intended to incorporate its prohibition against employment discrimination into Title II,[18] or (4) relied solely on the foregoing precedent without independent consideration of the problem.[19] Because of the limited analysis performed in those cases - in particular, their failure to consider the statutory text and context carefully - we simply do not find them persuasive.

CONCLUSION

We realize that our decision creates an inter-circuit split of authority. Although we are hesitant to create such a split, and we do so only after the most painstaking inquiry, we must follow the unambiguously expressed intent of Congress. We therefore hold that Title II does not apply to employment.

AFFIRMED.

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clear, however, that § 12132 prohibits employment discrimination by public entities on the basis of disability.") (footnote and citation omitted); *Wagner* v. *Texas A & M Univ.*, 939 F. Supp. 1297, 1309 (S.D. Tex. 1996) ("Although it is not apparent from the plain language of § 12132, the regulations issued by the Department of Justice make it clear that the prohibition against discrimination by public entities includes employment discrimination."). *See also Winfrey* v. *City of Chicago*, 957 F. Supp. 1014, 1023 n.7 (N.D. Ill. 1997) (similar); *Silk* v. *City of Chicago*, No. 95 C 0143, 1996 WL 312074, *10 (N.D. Ill. June 7, 1996) (similar); *Benedum* v. *Franklin Township Recycling Center*, No. 95-1343, 1996 WL 679402, at *5 (W.D. Pa. Sept 12, 1996) (similar); *Petersen* v. *Univ. of Wisconsin Bd. of Regents*, 818 F. Supp. 1276, 1278 (W.D. Wis. 1993) (similar).

[18] *See, e.g., Bledsoe*, 133 F.3d at 821; *Alberti*, 1998 WL 954876, at *5; *Downs*, 13 F. Supp. 2d at 135; *Ethridge*, 847 F. Supp. at 906.

[19] *See, e.g., Saylor* v. *Ridge*, 989 F. Supp. 680, 688 (E.D. Pa. 1998) ("We are inclined to follow the reasoning and holdings of our brethren which *also* appears to be the view followed by the majority of courts nationwide which have confronted this issue."). *See also Magee* v. *Nassau County Medical Center*, 27 F. Supp. 2d 154, 159 (E.D.N.Y. 1998) (similar); *Fobar* v. *City of Dearborn Heights*, 994 F. Supp. 878, 885 n.3 (E.D. Mich. 1998) (similar); *Bruton* v. *Southeastern Penn. Transp. Auth.*, No. 94- CV-3111, 1994 WL 470277, at *2 (E.D. Pa. Aug. 19, 1994) (similar).

SCOT L. ZIMMERMAN, Plaintiff-Appellant,

v.

STATE OF OREGON
DEPARTMENT OF JUSTICE, Defendant-Appellee.

No. 97-36101

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

July 28, 1999, Filed

The panel has voted to deny the petition for rehearing *en banc*.

The full court was advised of the petition for rehearing *en banc*. A judge of the court requested a vote on whether to rehear the matter *en banc*. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing *en banc* is DENIED.

REINHARDT, Circuit Judge, with whom Circuit Judges PREGERSON and HAWKINS join, dissenting from the denial of reconsideration *en banc*:

I dissent from the court's refusal to reconsider, *en banc*, the panel's decision in this important case of national significance. The panel's opinion holding that Title II of the Americans with Disabilities Act (ADA) does not prohibit employment discrimination by public entities is directly contrary to the plain language of the statute, to the clearly expressed intent of Congress, and to the Department of Justice's authoritative implementing regulations. Moreover, the panel's

opinion conflicts either directly or indirectly with the position taken by every circuit to confront the question, including ours, *See Norman-Bloodsaw* v. *Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1272 (9th Cir. 1998) (applying, without discussion, Title II to employment discrimination claim); *Bledsoe* v. *Palm Beach County Soil and Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998) (holding that Title II applies to employment discrimination); *Castellano* v. *City of New York*, 142 F.3d 58 (2d Cir. 1998) (applying Title II to employee benefits discrimination claim); *Holmes* v. *Texas A & M*, 145 F.3d 681, 684 (5th Cir. 1998) (applying Title II to employment discrimination claim); *Doe* v. *University of Maryland Medical Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995) (applying Title II to employment discrimination claim using same standards as under Rehabilitation Act), as well as with 18 of the 21 published district court opinions addressing the issue.[1] The Ninth Circuit now stands alone in adopting an

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[1] *Saylor* v. *Ridge*, 989 F. Supp. 680 (E.D. Pa. 1998); *Magee* v. *Nassau County Medical Center*, 27 F. Supp. 2d 154 (E.D.N.Y. 1998); *Fobar* v. *City Dearborn Heights*, 994 F. Supp. 878 (E.D. Mich. 1998); *Alberti* v. *City and County of San Francisco*, 32 F. Supp. 2d 1164 (N.D. Cal. 1998); *Downs* v. *Massachusetts Bay Transp. Auth.*, 13 F. Supp. 2d 130 (D. Mass. 1998); *Winfrey* v. *City of Chicago*, 957 F. Supp. 1014 (N.D. Ill. 1997); *Dominguez* v. *City of Council Bluffs*, 974 F. Supp. 732 (S.D. Iowa 1997); *Hernandez* v. *City of Hartford*, 959 F. Supp. 125 (D. Conn. 1997); *Roe* v. *County Comm'n of Monongalia*, 926 F. Supp. 74 (N.D. W. Va. 1996); *Graboski* v. *Guiliani*, 937 F. Supp. 258 (S.D.N.Y. 1996); *Wagner* v. *Texas A & M Univ.*, 939 F. Supp. 1297 (S.D. Tex. 1996); *Davoll* v. *Webb*, 943 F. Supp. 1289 (D. Colo. 1996); *Dertz* v. *City of Chicago*, 912 F. Supp. 319 (N.D. Ill. 1995); *Doe* v. *County of Milwaukee*, 871 F. Supp. 1072 (E.D. Wisc. 1993); *Eisfelder* v. *Michigan Dep't of Natural Resources*, 847 F. Supp. 78 (W.D. Mich. 1993); *Finley* v. *Giacobbe*, 827 F. Supp. 215 (S.D.N.Y. 1993); *Petersen* v. *University of Wisconsin Bd. of Regents*, 818 F. Supp. 1276 (W.D. Wisc. 1993); *Ethridge* v. *State of Alabama*, 847 F. Supp. 903 (M.D. Ala. 1993). Two of the three district court opinions agreeing with *Zimmerman* have already been overruled: *Bledsoe* v. *Palm Beach Soil and Water Conservation Dist.*, 942 F. Supp. 1439 (S.D. Fla. 1996), *rev'd*, 133 F.3d 816 (11th Cir. 1998), and *Decker* v. *University of Houston*, 970 F. Supp. 575 (S.D. Tex. 1997). *Decker* is no longer good

interpretation of the ADA that deprives disabled persons of a right expressly granted them by Congress - the right to bring an action for employment discrimination under Title II of the ADA.

Overview

The panel holds that the "plain meaning" of Title II of the ADA excludes discrimination in employment from the otherwise broad anti-discrimination prohibition of that Title. Such is not only not the plain meaning of Title II, but the panel's interpretation is directly contrary to the express language of the Title, to the unequivocal legislative history of the Title and to the uniform administrative interpretations of the Title rendered by the agency charged by Congress with that function. Title II contains two independent clauses, each of which serves to prohibit discrimination in employment. The Title contains no language of exclusion and the panel points to none. Rather it relies on a concept of its own creation - "inputs" and "outputs" - a concept found nowhere in the statute, or in any of the pertinent materials, as well as on a structural argument not accepted by any other circuit court. The panel's mode of statutory analysis at most results in a question of statutory ambiguity. However, if Title II were ambiguous, we would still be required by the applicable rules of statutory construction to hold that it covers every form of discrimination, including employment discrimination. Thus, the panel is compelled to base its decision exclusively on its plain meaning argument, an argument that cannot survive serious scrutiny.

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law, given the Fifth Circuit's contrary opinion in *Holmes*. Thus, *Patterson* v. *Illinois Dep't of Corrections*, 35 F. Supp. 2d 1103 (C.D. Ill. 1999) provides the slim reed of support on which *Zimmerman* rests. In addition to these published cases, 4 out of 6 unpublished district court decisions disagree with *Zimmerman*.

A. Plain Meaning of the ADA

The plain meaning of Title II is that it prohibits employment discrimination as well as all other forms of discrimination by public entities against the disabled. The ADA was enacted by Congress in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II provides that no disabled individual:

> shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

42 U.S.C. § 12132. The panel concludes that this language obviously and unambiguously excludes discrimination in employment from its purview. Yet, there is nothing in the plain meaning of the words that even suggests, let alone mandates, this result. The words themselves are self-evidently broad and inclusive. There are two clauses; each of which, properly construed, includes a proscription on workplace discrimination.

1. First Clause

The first clause bars discrimination in any of the "programs, services, or activities" of a local governmental entity. The plain and ordinary meaning of "activity" clearly does not exclude hiring or employing workers. Indeed, putting people to work is often the chief "activity" of municipalities. Although Title II does not define these terms, the Rehabilitation Act - with which Congress specified that Title II is to be interpreted consistently - does. *See* 42 U.S.C. § 12133 (providing that "remedies, procedures, and rights" under Title II are the same as those provided in § 794a of the Rehabilitation Act); 42 U.S.C. § 12134 (providing that Title II should be interpreted consistently with regulations under the Rehabilitation Act). Section 508 of the Rehabilitation Act defines "program or activity" as "all of the operations" of the govern-

mental entity. 29 U.S.C. 794(b); *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37, 44 (2d Cir. 1997) (holding that "activity" under Title II has same meaning as "activity" under the Rehabilitation Act and includes all operations of the entity).

Furthermore, the Supreme Court has specifically interpreted the "programs and activities" language in the Rehabilitation Act to include employment, and thus to bar employment discrimination. *Consolidated Rail* v. *Darrone*, 465 U.S. 624, 631-34 (1984). The language at issue here (Title II) is unquestionably broader than that in Consolidated Rail, particularly as Title II, unlike the Rehabilitation Act, contains an independent discrimination clause banning all discrimination, in addition to the clause which the Supreme Court construed: the "programs and activities" provision that is common to both statutes. Thus, there can be no justification for concluding, as the panel does, that Title II is somehow narrower. Indeed, applying Title II to discrimination in employment, the Fourth Circuit concluded that the same standard applies to employment discrimination actions brought under Title II and the Rehabilitation Act, because, as Judge Wilkins wrote for the court, in an opinion joined by Judges Wilkinson and Luttig, "the language of the Rehabilitation Act and Title II is substantially the same." *Doe* v. *University of Maryland Medical Sys. Corp.*, 50 F.3d 1261, 1264 (4th Cir. 1995). Moreover, the ADA contains a further provision stating that "nothing in this chapter [the ADA] shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such title. 42 U.S.C. § 12201(a). Where, as here, the language is not only similar, but indeed broader, it must be accorded at a minimum the same meaning - i.e., prohibiting employment discrimination.

The panel attempts to distinguish the Supreme Court decision in Consolidated Rail by pointing out that the Rehabilitation Act, unlike the ADA, was limited to those governmental

entities receiving federal funds. Thus, according to the panel, the Supreme Court interpreted the Rehabilitation Act to bar employment discrimination because it was possible that federal funds "may well flow into compensation for employees." The panel overlooks the fact, however, that in Consolidated Rail, the Supreme Court expressly rejected the argument that Congress was concerned about whether the federal funds were to be used to promote employment, and instead said that the Act was intended to "prohibit[] employment discrimination regardless of the purpose of federal financial assistance." 465 U.S. at 632.

Despite the overwhelming legal authority that the phrase "services, programs, and activities" under Title II is to be interpreted consistently with the phrase "programs and activities" under the Rehabilitation Act, and thus to include employment discrimination, the panel arrives at precisely the opposite conclusion. In so doing, the panel rests its determination almost entirely on an erroneous and non-existent dichotomy between "inputs" and "outputs," asserting that employment is in the former category, while "programs, services, or activities" fall within the latter.

The distinction between "inputs" and "outputs" finds no support whatever in the statutory language (or in the legislative or administrative history). Indeed, the approach was first concocted by a district court in Florida in a decision that has since been reversed in an Eleventh Circuit opinion holding that Title II does apply to employment discrimination. *See Bledsoe* v. *Palm Beach Soil and Water Conservation Dist.*, 942 F. Supp. 1439, 1443 (S.D. Fla. 1996), *rev'd*, 133 F.3d 816 (11th Cir. 1998).[2] The input-output format adopted by

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[2] The input-output distinction was also adopted by a district court in Texas, *see Decker*, 970 F. Supp. at 578, but that decision was subsequently implicitly overruled by the Fifth Circuit when it applied Title II to discrimination in employment. *See Holmes* v. *Texas A & M University*, 145 F.3d 681, 684 (5th Cir. 1998).

the panel will plunge district courts, and this court as well, into the impossible task of categorizing municipal and state functions and activities into two newly created categories - inputs and outputs - categories heretofore unknown to Congress or the affected administrative agencies, to local or state governments, or to the federal or state courts, with no standards or definitions to guide the entities or parties involved. In any event, it is certainly hard to find "inputs" and "outputs" in the plain meaning of Title II.

In reaching its decision that the plain meaning of Title II excludes discrimination in employment from its coverage, the panel also ignores the A.D.A.'s clear command that Title II be interpreted consistently with the regulations issued under the Rehabilitation Act. 42 U.S.C. § 12134. The particular regulations specified in the text of the statute include specific prohibitions against employment discrimination. The panel refused, however, to consider that statutory command as evidence that Title II prohibits employment discrimination because, it said, "employment is but one" of the topics covered by the regulations. Slip Op. at 2348. The panel does not, however, offer any reason why that fact should justify ignoring the specific statutory requirement that those particular regulations affecting employment discrimination be made applicable. Similarly, the panel refuses to give effect to the statute's directive in § 12133 that the "remedies, procedures, and rights" under Title II shall be identical with those under § 504 of the Rehabilitation Act. The referenced section of the Rehabilitation Act, in turn, provides that the "remedies, procedures, and rights [of Title VI of the Civil Rights Act] shall be available to any employee or applicant for employment . . . ." 29 U.S.C. 794a (emphasis added). The panel concludes that this plain language does not demonstrate a congressional intent to grant victims of employment discrimination a cause of action, i.e. rights, under Title II because that section of the Rehabilitation Act deals only with "procedural" rights. This reasoning completely ignores the fact that the rights addressed

are those of "any employee or applicant for employment." In this circumstance, it is irrelevant whether the rights are viewed as "procedural" or "substantive," although it is difficult, in any event, to comprehend why the panel concludes that they are plainly only procedural.

2. Second Clause

The plain meaning of the second clause of § 12132 even more clearly encompasses employment discrimination - if that is possible. The second clause is separated from the first by a comma followed by "or be subjected to discrimination by any such entity." The second and independent clause, like the first, does not contain any language which limits it to an "outward" focus; nor does its language in any way limit the flat and unqualified statutory prohibition against discrimination by any public entity. Certainly, nothing in the statutory language purports to exclude discrimination in employment. To the contrary, the second clause plainly and unequivocally prohibits covered entities from engaging in any discrimination. The panel, however, concludes that the second clause also applies only to discrimination in the provision of "services, programs, and activities" and cites *Crowder* v. *Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), for support. *Crowder* in no way supports the panel's opinion; indeed, it is pertinent only to the extent that it emphasizes the "or" that separates the two independent clauses, and the substantive differences in congressional intent with respect to these clauses. The only issue in *Crowder* was whether discrimination with respect to "services, programs, and activities" need be direct and intentional, and the court said, "no," a holding of no relevance here.

The proper construction of the second clause was afforded it by both the Eleventh and the Second Circuits. In *Bledsoe*, the Eleventh Circuit wrote:

> As the Second Circuit found in *Innovative Health Systems, Inc.* v. *City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997), "the language of Title II's antidiscrimi-

> nation provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of [a public entity]. Rather, it is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context, ..." Accordingly, employment coverage is clear from the language and structure of Title II.

Bledsoe, 133 F.3d at 821. To conclude that the panel clearly erred in holding that the plain meaning of Title II is that it is inapplicable to discrimination in employment, we need only look to what the Second and Eleventh Circuits have unequivocally stated regarding the Title's second and independent clause. "It is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context . . . ." *Id.*

The panel supports its niggardly construction of the second clause by suggesting that Title II's definition of "qualified individual with a disability" somehow excludes coverage for employment discrimination. Its argument essentially is that the definition of that term in 42 U.S.C. § 12131(2) necessarily limits Title II's coverage to "services, programs or activities." Slip Op. at 2338-39. There are two obvious problems with this argument. First, it would read the second clause of § 12132 - "or be subjected to discrimination" - entirely out of the statute and render it redundant. Second, as noted above, both Congress and the Supreme Court have already made it absolutely clear that programs and activities as used in the Rehabilitation Act - with which the ADA is to be interpreted consistently, *see Bay View Addiction Research and Treatment, Inc.* v. *City of Antioch,* 1999 WL 351126, at *3 (9th Cir. June 3, 1999), does cover employment. At most, the definition of a disabled person in the definition section of Title II raises a question, or creates an ambiguity, regarding the meaning of Title II's language. It does not in any way "plainly" exclude employment discrimination from the purview of a statute that, on its face, clearly covers it.

As the Eleventh Circuit concluded in *Bledsoe*: "Accordingly, employment coverage is clear from the language and structure of Title II." *Id.* In sum, the plain language of Title II prohibiting "discrimination," coupled with the plain language of other parts of Title II that incorporate by reference parts of the Rehabilitation Act, demonstrates that Congress unambiguously intended to include, and did include, employment discrimination within the scope of Title II. Such coverage is provided for in the plain language of both the first and the second clauses of § 12132, as indeed are all forms of discrimination by public entities. Thus, the panel's conclusion that the plain meaning of the statute compels the opposite result - that Title II excludes employment discrimination from its coverage - is to misread the statutory language completely.

3. Structure

The panel states that Title I of the ADA prohibits discrimination in employment, and then treats Titles I and II as necessarily mutually exclusive, although other circuits have consistently construed them as overlapping. *See e.g.*, *Bledsoe*, 133 F.3d at 820. In insisting on a necessary mutual exclusivity, the panel ignores the plain statutory language of Title II and relies on an entirely unsupportable theory that applying Title II to employment discrimination would render Title I superfluous. In this respect as well, the panel clearly errs. There are differences in the scope of coverage of employment discrimination under Title I and Title II (Title I covers employers with 15 or more employees, while Title II covers all public employers, regardless of size), the two Titles evolved from different civil rights laws (Title I is modeled on Title VII of the 1964 Civil Rights Act, while Title II is modeled on the Rehabilitation Act and Title VI of the 1964 Civil Rights Act), and there is a difference in the forms of relief (compensatory and punitive damages are available under Title I, but may not be under Title II), and the procedures to be followed (administrative exhaustion is required under Title I but not under Title II). Thus, the provisions of the two Titles

are not coextensive; although both apply to employment, neither is redundant.

Congress's decision to provide two approaches to remedying discrimination in employment in one complex disability statute has caused some to question the wisdom of its policy and its rationale. It is, of course, not our function to do so. *See United States* v. *Burdeau*, 1999 WL 421319, at *2 (9th Cir. 1999) (Kozinski, J., dissenting from the order rejecting the suggestion for rehearing *en banc*). In any event, if the fact that two Titles appear to address the same general area of discrimination raises some doubt about the meaning of one or both Titles, the statute is, at most, ambiguous, and it is the unequivocal legislative history to which we must turn.

Before doing so, I would add that the panel acted properly in examining the statute's structure and the statute as a whole, as well as the statutory objectives and policies, if it believed that its effort to determine Title II's plain meaning would benefit from such an examination. *See Northwest Forest Resource Council* v. *Glickman*, 82 F.3d 825, 830 (9th Cir. 1996). The problem here, in part, is that its examination led it to the wrong result. The statutory structure does not support the panel's conclusion; nor does the statute as a whole. A careful examination merely tells us that the statute contains overlapping Titles. More significantly, the statute's objectives and policies not only do not support the holding the panel reaches, but compel the opposite result. Nowhere in its opinion does the panel suggest, nor could it, that any policy or objective of the ADA argues for limiting any of its provisions, including Title II, so as to exclude employment discrimination. To the contrary, the policies and objectives of the act were to eradicate all discrimination against the disabled by public entities in every area, including employment discrimination. It is a generous rather than a stingy reading of Title II that furthers the ADA's policies and objectives.

4. Summary

If anything is clear about this case, it is that the plain meaning of the statute is not what the panel says it is. No matter how apparent it may be that particular statutory language provides "X", a court can determine, if it chooses, that the statute does not provide "X"; and indeed, that "X" has nothing whatever to do with it. It can do so by holding that the statutory language plainly says what it plainly does not. A court can announce that the word "dog" plainly means "cat" if a panel so chooses, and a majority of eligible active judges then elects not to take the case *en banc*.

That is what happened here: Congress, by plain language (or "wording" as the panel insists on putting it) provided disabled persons with a Title II remedy for discrimination in public employment. The panel then held that the plain meaning of the statute is that it did not, and a majority of our active judges has now seen fit to allow the panel's erroneous pronouncement to stand.

What the panel and our court have done is of course not unique. Courts have in the past chosen on various occasions to read statutes as having precisely the opposite meaning from that dictated by the statutes' plain language. Even the Constitution has been the victim of this odd interpretive technique. The most prominent example is the perverse interpretation given to the Eleventh Amendment in *Hans* v. *Louisiana*, 134 U.S. 1, 14 (1890). There, the Court read the plain language of the Amendment, which stated that the federal courts lack jurisdiction to consider suits brought against a state by "citizens of another state" as having almost precisely the opposite meaning: that federal courts lack jurisdiction over suits brought against a state by citizens of the same state. The Court rejected the plaintiff's appeal to the plain language of the amendment as "an attempt to strain the constitution and the law to a construction never imagined or dreamed of." Justice Bradley, writing for the majority, declined even to give any policy justifications for the decision to ignore what he

called "the letter" of the law, saying "it is enough for us to declare" a contrary rule. 10 S. Ct. at 508. This ostensibly "plain" meaning was reaffirmed by a divided Supreme Court in 1987. *See Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 492 (1987) (declining to overrule Hans on the basis of stare decisis). Today, this contrarian "construction" of the Eleventh Amendment's plain language lies at the heart of federalism's recent resurgence. *See Alden* v. *Maine*, 119 S. Ct. 2240, 1999 WL 412617, *13 (U.S. 1999) (following *Hans* in declining to "adhere to the mere letter" of the Eleventh Amendment).

Hans and other cases involving judicial failures to respect the plain meaning of words contained in the Constitution or in statutes do not, of course, excuse what our court does today. To the contrary, this latest example should cause great concern to those who volubly proclaim their fear that federal judges do not demonstrate sufficient respect for the decisions of other branches of government or for the Constitution's framers. Whether a congressionally granted right is invalidated under the guise of statutory construction or by reliance on a Constitutional doctrine conjured up by the judiciary, the result is the same; the will of the people has been improperly frustrated.

B. Legislative History

The panel is compelled to rely on "plain language" that is nowhere to be found in the statute because the legislative history of Title II overwhelmingly confirms that Congress did indeed intend to ban employment discrimination in Title II. If the statute were ambiguous - and that is the best that the panel could legitimately hope to prove by its wording and structure arguments - the legislative history would be dispositive. The House Judiciary Committee Report states that "in the area of employment, title II incorporates" the regulations under the Rehabilitation Act. H.R. Rep. No. 101-485(III) (1990). The House Report also states that Title II is intended to prohibit

forms of discrimination "identical" to those contained in Title I - which deals exclusively with employment discrimination - and that it is to "work in the same manner as section 504" of the Rehabilitation Act, which also prohibits employment discrimination. *Id.* at 84. Likewise, the Senate Labor Committee Report states that employment discrimination is prohibited by Title II: "The existence of non-disability related factors in the rejection decisions does not immunize employers" making adverse hiring determinations. S. Rep. No. 116, 101st cong., 1st Sess., at 45 (1989). As the Eleventh Circuit observed in *Bledsoe*, "extensive legislative commentary regarding the applicability of Title II to employment discrimination . . . is so pervasive as to belie any contention that Title II does not apply to employment actions." 133 F.3d at 821.

The panel's opinion never even acknowledges the existence of these authoritative Committee Reports and the clear evidence of congressional intent. The panel insists instead that the language and structure of the law unambiguously makes clear that Title II excludes "employment" discrimination from its scope. The reason the panel does not go beyond this point is evident. Unless the panel can base its decision on its argument that the plain language of the statute excludes employment discrimination from the coverage afforded by Title II, the argument is over. If the ADA is "ambiguous," then in light of the legislative history, Title II must be held to cover employment discrimination.

C. *Chevron* Deference

The panel is compelled to rely exclusively on its argument that Title II plainly and unambiguously excludes discrimination in employment for another reason as well. If the statute does not by its plain language compel exclusion of employment discrimination, and it is instead found to be ambiguous, *Chevron* deference also requires that we hold that Title II does indeed prohibit employment discrimination. Congress delegated enforcement of Title II to the Department of Jus-

tice, and directed it to promulgate regulations consistent with the regulations implementing the Rehabilitation Act. 42 U.S.C. § 12134. Moreover, as the House Judiciary Committee Report states, the Department of Justice was directed to specify the interpretation of the forms of prohibited discrimination where ambiguity existed and interpretation was required.

> Unlike the other Titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit. Thus, the purpose of this section is to direct the Attorney General to issue regulations setting forth the forms of discrimination prohibited. The Committee intends that the regulations under Title II incorporate interpretations of the term discrimination set forth in Titles I and III of the ADA to the extent that they do not conflict with section 504 regulations.

H.R. Rep. No. 485(III), 101st Cong., 2d Sess., at 52 (1989). This language was used in both the Judiciary and Education Committee Reports.

The Department of Justice, acting pursuant to this clear congressional command, issued regulations that straightforwardly apply Title II to employment discrimination. 28 C.F.R. pt. 35, App. A ("Title II of the ADA applies to all activities of public entities, including their employment practices."); 28 C.F.R. § 35.140(a) ("No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity."). If it is not plain from the language, structure, and legislative history that Congress intended to apply Title II to public employment, then, at the very least, it is uncertain whether or not it intended to do so. In such cases, the Department of Justice was authorized to fill in the gaps. The Department's interpretation is neither arbitrary nor manifestly contrary to the statute. Instead, these regulations faithfully adhere to Congress's intent, are well within the agency's discretion, and are thus controlling.

D. Conclusion

The plain language of the statute conclusively demonstrates that, as every other circuit to have considered the issue has concluded, Title II applies to employment discrimination. Both major clauses of the provision independently proscribe such discrimination. At the very least, the statute is ambiguous, and in that event, both the unequivocal legislative history and the uniform Department of Justice's regulatory interpretations, to which we must give deference, compel the conclusion that Title II applies to employment discrimination. Unquestionably, that is what Congress intended, and that is what the other circuit courts have readily understood. Here, the panel made a serious error of law in a case of great significance, where uniformity is necessary. Its holding that the plain language of Title II excludes employment discrimination is simply contrary to the applicable rules and precepts of statutory construction, as well as to all prior caselaw in the circuit courts. For these reasons, I dissent.

(2)

No. 99-243

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In the Supreme Court of the United States

OCTOBER TERM, 1999

SCOT L. ZIMMERMAN,

Petitioner,

v.

STATE OF OREGON DEPARTMENT OF JUSTICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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148

QUESTION PRESENTED

Title I of the Americans With Disabilities Act prohibits discrimination in private and governmental employment based on disability and provides redress against the employer in federal court after exhausting administrative remedies. Title II of the ADA prohibits public entities from engaging in certain conduct based on a person's disability and provides redress directly in federal court. Title II does not expressly mention employment discrimination among the types of conduct prohibited, nor does it expressly require injured parties to exhaust administrative remedies before bringing suit in federal court.

The question presented is: Did Congress intend that employment discrimination claims could be brought against a state employer under Title II, thereby avoiding Title I's exhaustion requirements.

TABLE OF CONTENTS

Page

Question Presented i

Reasons Why the Petition Should Be Denied 1

I. Introduction 1

II. The split in the circuits is narrow, may well resolve itself and in any event is relatively superficial. 3

III. To resolve the interpretive question presented here may require the Court to address several issues neither briefed nor decided below. 8

Conclusion 10

TABLE OF AUTHORITIES

Page

Cases Cited

Bledsoe v. Palm Beach County Soil & Water Conservation District, 133 F.3d 816, *reh. en banc denied,* 140 F.3d 1044 (11th Cir. 1998), *cert. denied* 119 S.Ct. 72 (1998) 3,5,6

Castellano v. City of New York, 142 F.3d 58 (2nd Cir. 1998) 4

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 2,5,6,9

Dandridge v. Williams, 397 U.S. 471 (1970) 9

Davoll v. Webb, 1999 WL 969263 (10th Cir. 1999) 4,8

Doe v. University of Maryland Medical System Corp., 50 F.3d 1261 (4th Cir. 1995) 4,8

Gregory v. Ashcroft, 501 U.S. 452 (1991) 6

Holmes v. Texas A&M University, 145 F.3d 681 (5th Cir. 1998) 3,8,9

Norman-Bloodsaw v. Lawrence Berkeley Laboratory, 135 F.3d 1260 (1998) 5

Zimmerman v. State of Oregon Department of Justice, 170 F.3d 1169, *reh. en banc* denied 183 F.3d 1161 (9th Cir. 1999) 3,5

Statutory Provisions

29 U.S.C. § 794 4

42 U.S.C. § 12101 *et seq.* 1

42 U.S.C. § 12117(a) 1

42 U.S.C. § 12131 *et seq.* 1
42 U.S.C. § 12132 1

RESPONDENT'S BRIEF IN OPPOSITION

REASONS WHY THE PETITION SHOULD BE DENIED

I. Introduction

Title I of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") prohibits discrimination in employment based on an employee's disability. Title I allows an employee who has been the subject of discrimination to sue the employer, including a government employer, but only after the employee has exhausted available administrative remedies. 42 U.S.C. § 12117(a).

Title II of the ADA, 42 U.S.C. § 12131 *et seq.* and § 12132 in particular, prohibits a public entity from excluding from participation in or denying the benefits of its services, programs or activities or subjecting to discrimination any "qualified individual with a disability." Title II does not expressly require that a disabled person claiming to have been excluded from or denied participation in a service, program or activity, or to have been subjected to discrimination, exhaust any administrative remedies before suing the public entity in federal court.

While Title I expressly prohibits employment discrimination by a public entity, two federal circuit courts are split on whether Title II also prohibits public entities from engaging in employment discrimination. Only one federal circuit court—the Ninth Circuit—has analyzed this interpretive question by painstakingly examining the actual language of Titles I and II. Concluding that the language was plain and unambiguous, the Ninth Circuit also became the first federal circuit court to conclude that Title II does not address discrimination in government employment and does not, therefore, provide a federal remedy for that discrimination.

Although a split exists among the circuits, that split is as yet narrow, may well be short-lived, and is relatively superficial in any event. To date, the split involves only two circuit courts. Although four other circuit courts have assumed Title II covers employment discrimination, they have not been called upon actually to decide the question. The State believes that there is at least a reasonable probability that other circuit courts, when called upon to decide the question, will side with the Ninth Circuit's well-reasoned and thoughtful resolution of the question. Meanwhile, the disagreement over Title II's coverage need not cause any person subjected to disability-based discrimination by a government employer to be deprived of a federal remedy in light of Title I's remedial provisions.

Should this court grant certiorari, the State intends to raise several arguments in defense of the result reached by the Ninth Circuit that were not raised or considered specifically below. Principal among them is that in enacting the ADA, Congress lacked the power to abrogate states' 11th Amendment immunity from suit in federal court. Moreover, the State will assert that even if Title II were ambiguous about covering government-employment claims and subjecting States to suit in federal court for those claims, the "plain statement" rule mandates that these questions be resolved in favor of the States. Finally, the State will assert that *Chevron* deference[1] is inappropriate when the effect of granting deference to an agency's interpretation of a federal statute is to subject States to suit in federal court. In other words, as with the "plain statement" rule, Congress can only curtail states' conduct and

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[1] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (stating that when Congress ambiguously expresses its intent, the court will uphold administrative regulations construing the statute unless the regulation is "arbitrary, capricious, or manifestly contrary to the statute").

subject them to damages actions in federal court when Congress has clearly and unambiguously expressed that intent in the statute.

The State respectfully submits that because the split in the circuits has just arisen, may only be temporary and in any event is not terribly consequential at this point in view of the availability of Title I claims, granting certiorari now would be premature and inappropriate. Moreover, this case is not the appropriate vehicle to address whether Title II covers public-entity-employment discrimination because issues that may be key to resolving that question were not raised or considered below.

II. The split in the circuits is narrow, may well resolve itself and in any event is relatively superficial.

Prior to the Ninth Circuit's decision in *Zimmerman v. State of Oregon Department of Justice*, 170 F.3d 1169, *reh. en banc* denied 183 F.3d 1161 (9th Cir. 1999), the only circuit court to consider the question of Title II's applicability to employment discrimination claims was the Eleventh Circuit in *Bledsoe v. Palm Beach County Soil & Water Conservation District,* 133 F.3d 816, *reh. en banc denied,* 140 F.3d 1044 (11th Cir. 1998), *cert. denied* 119 S.Ct. 72 (1998). Although other circuits have applied Title II in the employment discrimination context, they have done so because the question of its applicability had not been raised.

- In *Holmes v. Texas A&M University,* 145 F.3d 681 (5th Cir. 1998), plaintiff sued the university under Title II of the ADA, contending that he had been terminated due to disability. The university succeeded in the district court in defeating plaintiff's claim on statute of limitations grounds. The Fifth Circuit assumed without deciding that Title II applied, but agreed with the

district court that plaintiff had failed to bring his claim timely.

- In *Doe v. University of Maryland Medical System Corp.*, 50 F.3d 1261 (4th Cir. 1995), plaintiff—a neurosurgical resident who had tested positive for HIV—sued the university hospital under Title II and section 504 of the Rehabilitation Act, 29 U.S.C. § 794, after his surgical privileges were terminated. The Fourth Circuit assumed that Title II applied to plaintiff's employment discrimination claim, but agreed with the district court that plaintiff had not demonstrated that he was a "qualified individual with a disability" entitled to relief.

- In *Castellano v. City of New York*, 142 F.3d 58 (2nd Cir. 1998), disabled retirees sued under Titles I and II of the ADA and section 504 of the Rehabilitation Act claiming discrimination in the provision of retirement benefits. The court assumed that most claims could be brought under all three statutes, then rejected them because plaintiffs had failed to show that they had been discriminated against because of a disability. 142 F.3d at 70.

- Most recently, in *Davoll v. Webb*, 1999 WL 969263 (10th Cir. 1999), disabled, retired, Denver police officers sued under Titles I and II of the ADA, contesting the city's policy forbidding disabled police officers from transferring into other vacant positions in city government. The court noted the disagreement between the Ninth and Eleventh Circuits over the question of Title II's applicability to an employment discrimination claim. The court declined to resolve the question for the Tenth Circuit inasmuch as the city had

only raised the issue for the first time in a memorandum of supplemental authorities citing *Zimmerman*.

That other circuit courts have assumed, without deciding, that Title II extends to employment-discrimination claims should not enhance the gravity of or widen the narrow divide that now exists among the circuits. Indeed, prior to *Zimmerman*, the Ninth Circuit itself had assumed that Title II applied in the employment context. *See Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1270 (1998) (assuming "without discussion" the applicability of Title II to an employment claim.) Now that the Ninth Circuit has addressed the issue and has rejected the Eleventh Circuit's analysis in *Bledsoe*, litigants in other circuits likely will call upon their courts to address the issue as well. And the State believes a reasonable likelihood exists that, like the Ninth Circuit, these courts also will find unpersuasive the Eleventh Circuit's legal analysis.

In *Zimmerman*, the Ninth Circuit explained how, based on the text of Titles I and II, Congress had expressed unambiguously its intent that disability-based employment discrimination claims be brought only under Title I and not Title II. In *Bledsoe*, the Eleventh Circuit purported to conduct a "statutory language" analysis, but in reality, the court's conclusion was driven by two factors: 1) its view of the legislative history as reflecting Congress' intent that Title II covers employment, and 2) its deference to the Department of Justices' regulations interpreting Title II to cover claims of employment discrimination. 133 F.3d at 822. Two assumptions thus permeate *Bledsoe*'s analysis: first, that the task is simply to discern Congress' intent; and second that the *Chevron* principle of deferring to the DOJ regulations is helpful—perhaps even dispositive—in discerning that intent.

Even if one were not persuaded by the Ninth Circuit's conclusion that Congress had clearly expressed its intent that employment claims be reserved to Title I, the ambiguity, if any, in the language does not advance the contrary conclusion. With all due respect to the Eleventh Circuit, the State submits that reliance on legislative history and agency regulations is inappropriate in resolving the issue of congressional intent that is presented here. The question is whether, in enacting Title II, Congress intended to prohibit governmental entities, including States, from engaging in certain conduct—specifically, disability-based employment discrimination—and to subject those public bodies to suit for damages in federal court. That is not an ordinary legislative intent question. Answering that question in the affirmative considerably encroaches on and erodes state sovereignty, particularly if, as *Bledsoe* at least intimates, Title I's administrative exhaustion requirements do not apply to an action brought under Title II and some or all defenses available under Title I also do not apply.

The Eleventh Circuit failed to heed this Court's insistence that Congress must express its intent clearly and unmistakably when it seeks to intrude on areas of state and governmental sovereignty. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 467–70 (1991) (refusing to interpret ADEA to cover state-appointed judges absent a "plain statement" that judges were covered). Moreover, the court wrongly assumed without analysis that deference to DOJ's regulations under *Chevron* was appropriate in deciding the extent to which Congress intended to intrude into or reduce state sovereignty. *Chevron* deference is subservient to the principle, embedded in the Tenth Amendment, that while the States have conferred on Congress the power in many instances to encroach on state sovereignty, Congress must announce clearly and expressly its intent when it seeks to exercise that power. Tenth Amend-

ment concerns that Congress be candid and unambiguous about its intentions so that States are on notice are not allayed one iota if Congress' latent intent can be effectuated via agency regulations promulgated beneath the radar of state scrutiny and state influence.

The State respectfully submits that the Eleventh Circuit's undue reliance on legislative history and DOJ's interpretive regulations makes its conclusion that Title II covers public-entity-employment discrimination highly suspect. Once lower courts realize that legal problems abound in the Eleventh Circuit's analysis, what appears now to be a conflict in the circuits may well disappear.

The State further submits that the split is of little consequence in terms of depriving a deserving plaintiff of an adequate federal remedy. Title I of the ADA unquestionably was drafted to cover disability-based employment discrimination, including discrimination by government employers. Setting to one side for the moment the Eleventh Amendment question, the circuit split on the reach of Title II in and of itself will, therefore, not deprive any government employee of a federal remedy for disability-based discrimination. No suggestion has been made that Title I does not provide a full remedy for such discrimination claims. The persons likely not to avail themselves of Title I's provisions are those who either failed to exhaust its remedies and for whom those remedies are no longer available, or those who desire to rush directly to federal court with their money damages claims, contrary to the carefully thought out, administrative, remedial scheme that Congress provided for in Title I. In short, no one with a disability-related employment-discrimination claim necessarily has to be adversely affected because of a disagreement among the circuits over whether Title II prohibits employment discrimination.

Moreover, it is even unclear at this point whether persons who have failed to exhaust their administrative remedies and are therefore foreclosed from a Title I remedy would be able to file under Title II. *See Holmes*, 145 F.3d at 684 ("We decline to consider the difficult issue of whether exhaustion of administrative remedies with the EEOC is required under Title II of the ADA, a matter moot to the resolution of this appeal.") Indeed, other circuits faced with Title II claims have borrowed liberally from Title I's requirements. *See, e.g., Doe v. University of Maryland Medical System Corp.*, 50 F.3d at 1265 (applying definitions from Title I to claim of discrimination under Title II, which has its own definitions); *Davoll v. Webb*, 1999 WL 969263, *7–9 (applying Title I definition of "qualified individual with a disability" in Title II context, even though Title II has its own definition; concluding that plaintiffs have a duty to "initiate the interactive process envisioned by the ADA," which process is mandated by EEOC regulations adopted to implement Title I, not Title II). If persons can only file claims under Title II provided they first comply with Title I's requirements, the question of Title II's availability becomes a moot point for most government employees and certainly all state employees.

III. To resolve the interpretive question presented here may require the Court to address several issues neither briefed nor decided below.

Even assuming that this Court were not satisfied with the Ninth Circuit's conclusion that Congress clearly expressed its intent in Titles I and II that employment-discrimination claims be limited to Title I, the Court's work would only have begun. First, the State would intend to argue that, as discussed above, the "plain statement" rule applies because the issue is whether Congress acted in Title II not only to limit government action but to subject governmental entities, including States, to suit

directly in federal court.[2] Second, the State would intend to argue that part two of the *Chevron* test does not apply in this context because the effect of interpreting Title II to cover employment discrimination is to lessen state-sovereign powers and subject States to suits in federal courts without their consent. The State would argue that *Chevron* deference is inappropriate if the "plain statement" rule applies. That is, for Congress to impose requirements on the States that private parties may enforce directly in federal court, Congress must say it clearly and unambiguously. If Congress has been ambiguous about its intent, no federal agency, exercising delegated rule-making powers, can "clarify" that which Congress itself failed to do.

Third, the State would intend to argue that Zimmerman's claim under Title II is barred because, as the district court found, Zimmerman failed to exhaust his administrative remedies. Thus, this Court may have to resolve whether Title I's exhaustion requirements nevertheless apply to claims brought under Title II, a question noted but not addressed in *Holmes*.

The final looming issue not briefed or addressed below, but that this Court will be asked to address should it grant certiorari, is the Eleventh Amendment question: whether Congress exceeded its authority to enforce the Fourteenth Amendment when it purportedly abrogated States' immunity from suits under Title II. The importance of the issue and the fact none of the parties in this case briefed the issue below strongly suggest that unless the present case is the only one

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[2] The State submits that this and other arguments that it did not specifically raise below would be properly before the Court because they are fairly subsumed within the question presented in the petition and are alternative bases to uphold the judgment below. *See, e.g., Dandridge v. Williams*, 397 U.S. 471, 475, n. 6 (1970) (stating basic rule that the prevailing party may rely on any ground in support of the judgment below, even if not relied upon or considered by the court below).

available to address the issue, the Court should await a more appropriate opportunity.

CONCLUSION

No urgency demands that this Court resolve the question of whether Title II of the ADA covers disability-based employment discrimination. The issue so far divides only two circuit courts; it may, with time and thoughtful consideration by the lower courts cease to be an issue; and, in any event, in the grand scheme of things, it is an issue that is of relatively minimal significance. Even assuming the Court deems the issue to be significant, this case is an inappropriate one to resolve it. The petition for writ of certiorari should be denied.

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No. 99-243

IN THE

Supreme Court of the United States

Scot L. Zimmerman,
Petitioner,

v.

State of Oregon Department of Justice,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

Because Respondent has asserted its Eleventh Amendment immunity from suit under Title II, BIO 2, this Petition should be granted or, in the alternative, held pending the disposition of No 98-796, *United States* v. *Florida Board of Regents*. The Court has held another petition addressing states' immunity from suit under Title II. No. 98-829, *Florida Dept. of Corrections* v. *Dickson*. (Petitioner is aware of two other petitions that raise the identical issue. No. 99-461, *WMATA* v. *Swanks* (brief in opposition filed Nov. 9, 1999); No. 99-423, *Alsbrook* v. *Maumelle, AK* (brief in opposition due Dec. 8, 1999)). In the Petition is held, within seven days of this Court's decision in the *Florida Board of Regents* case, Petitioner will file a supplemental brief addressing whether certiorari should be granted or the case remanded to the Ninth Circuit for further consideration.

Respondent is wrong to contend that the Petition should be denied. At the very least, the conflict in the circuits over states' immunity from suit under Title II, *see* Pet. 12-13, is an important constitutional question directly implicated by the pending *Florida Board of Regents* case. In addition, the Ninth Circuit's holding that Title II does not reach employment discrimination flatly conflicts with the contrary holding of the Eleventh Circuit in *Bledsoe* v. *Palm Beach County Soil & Water Conservation District*, 133 F.3d 816, *cert. denied*, 119 S. Ct. 72 (1998). The Ninth Circuit consciously created the circuit split, Pet. App. 35a, and Respondent expressly recognizes the conflict as well, BIO 2. The division in circuit authority, together with the fact that the decision below invalidates a binding federal regulation, plainly merits review in this Court.

Respondent nonetheless contends that certiorari should be denied because it "believes" that there is a "reasonable probability" that in the future other circuits "will side with the Ninth Circuit's" reading of Title II. BIO 2. Not only is that

course of events exceptionally unlikely, *see infra*, but it is also totally irrelevant because the later developments Respondent imagines would not resolve the circuit conflict and thus would not obviate the need for this Court to grant to decide the question presented. In particular, Respondent cannot and does not contend that the Eleventh Circuit, which refused to rehear *Bledsoe* en banc without a single judge calling for a vote, will completely reverse course and agree with the Ninth Circuit. The circuit conflict accordingly will remain unresolved until this Court intervenes.

Respondent must therefore proffer some reason why this Court should defer resolving the question presented, but it pointedly fails to do so. The most that Respondent can say is that the circuit conflict will induce "litigants in other circuits [to] call upon their courts to address the issue as well." BIO 5. But that is precisely Petitioner's point: failing to grant certiorari in this case will result in nothing more than needless litigation over the scope of Title II. Courts may line up in support of the two competing positions, but that process will benefit no one at all. Respondent's suggestion that is as yet uncertain whether other procedural requirements of Title I implicitly apply to claims brought under Title II is irrelevant: that issue has not divided the circuits and it is not relevant to the question presented by this Petition, which is simply whether a claim of employment discrimination may be brought under Title II.

Nor is there reason to believe that this Court will benefit from further percolation of the issue in the lower courts. The proper construction of Title II has been the subject of the Department of Justice's regulatory process, followed by considered decisions of two circuits and the extensive dissent from the denial of rehearing en banc in this case, as well as more than a dozen rulings of federal district courts. *See* Pet. 8-10. In each instance, the statute's text and legislative history have been explored in detail. All that remains is for this Court to resolve the question conclusively.

In addition, there is no reason to believe that other courts will agree with the Ninth Circuit's decision. The decision below conflicts with an extraordinary array of judicial authority – not just the Eleventh Circuit's decision in *Bledsoe* but also decisions of district courts in *eleven* different circuits, *see* Pet. 10 – as well as with the Department of Justice's binding construction of Title II. Respondent suggests that the strength of the Ninth Circuit's reasoning is overpowering but it is telling that the brief in opposition fails to even *attempt* to defend the merits of the decision below. In point of fact, the decision in this case failed to convince even the Ninth Circuit, as three judges openly dissented from the denial of rehearing en banc, publishing a devastating critique of the panel opinion. Pet. App. 36a-51a. The suggestion that other circuits henceforth will uniformly adopt the view of the Ninth Circuit is accordingly insupportable.

Respondent next suggests that the question presented is insufficiently important to merit review in this Court, but plainly that is not correct. The conflict in the circuits creates an intolerable uncertainty over the scope of a major federal civil rights statute and the process for bringing discrimination claims against states. Respondent implicitly acknowledges the grave effects of this uncertainty when it predicts that the decision below will generate litigation in other circuits over the scope of Title II. *See supra.* Certainly, this case merits review at least as much as *West* v. *Gibson*, 120 S. Ct. 297 (1999), in which certiorari was granted after the Seventh Circuit held, in conflict with the Eleventh Circuit, that requests for *interest* (*i.e.*, only one element of the plaintiff's claim) are not subject to Title VII's administrative exhaustion requirements.

Respondent's final argument that it intends to make arguments in this Court that it neglected to raise below, and certiorari accordingly should be denied, barely merits a response. Respondent is under the serious misimpression that it may raise any argument it likes in support of the Ninth Cir-

cuit's judgment, no matter whether it made that argument below. BIO 9 n.2. In fact, this Court will not consider arguments raised for the first time in a brief in opposition to the petition for certiorari. *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1449 (1999). The exception is that Respondent may challenge the federal court's jurisdiction over this suit, including by asserting sovereign immunity. Pet. 14.

CONCLUSION

For the foregoing reasons, the Petition should be granted or held pending the disposition of No 98-796, *United States* v. *Florida Board of Regents*.

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SUPPLEMENTAL BRIEF OF THE PETITIONER

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SUPPLEMENTAL BRIEF OF THE PETITIONER

Petitioner Scot L. Zimmerman respectfully submits this Supplemental Brief in light of this Court's order listing his Petition for Conference together with No. 99-423, *Alsbrook* v. *Maumelle, AK* ("*Alsbrook*").

At least four Petitions for Writs of Certiorari now pending before the Court present the question whether Congress validly abrogated States' sovereign immunity by subjecting them to suit under the Americans With Disabilities Act ("ADA"). In addition to this case and *Alsbrook*, the same issue is presented by No. 98-829, *Florida Department of Corrections* v. *Dickson*, and No. 99-940, *DeBose* v. *Nebraska*.

It is now all but certain that this Court will be required to resolve whether the ADA validly abrogates States' sovereign immunity. Not only does the Eighth Circuit's en banc decision in *Alsbrook* invalidate an important federal statute in several states, but it also "is in direct conflict with the rulings of six other circuits, including three decisions that were rendered subsequent to the Eighth Circuit's ruling and that have expressly rejected that court's holding." Br. of United States, No. 99-423, *Alsbrook* v. *Maumelle, AK* 10. Even if this Court holds in No. 98-796, *United States* v. *Florida Board of Regents*, that Congress did not validly abrogate States' sovereign immunity from suit under the Age Discrimination In Employment Act, it is essentially inconceivable that (a) all six of the circuits that have rejected such a challenge under the ADA would reverse course, *and also* (b) this Court would regard the statute's unconstitutionality as so certain that it would decline to consider the issue at all.

When the Court grants certiorari to address States' sovereign immunity from suit under the ADA, it should do so in this case. Because sovereign immunity is a purely legal issue unrelated to the facts underlying the plaintiff's complaint, the four pending Petitions present equally appropriate vehicles to address the question. *Cf.* No. 98-1828, *Vermont Agency of*

Nat'l Resources v. *United States* (Order of Nov. 19, 1999, directing the parties to address whether private plaintiffs have standing under federal qui tam provisions, notwithstanding that the issue was not raised in the court of appeals). But only *this* Petition presents the opportunity to resolve as well the circuit conflict over whether Title II of the ADA applies to claims of employment discrimination. *See generally* Pet. for Cert. 7-12.

In particular, because sovereign immunity is a jurisdictional issue that must be addressed before any substantive dispute, this Court necessarily would resolve both questions in this case. If the Court holds that the ADA does not validly abrogate States' sovereign immunity, the Court will vacate the judgment below and remand with instructions to dismiss for lack of jurisdiction. The Ninth Circuit's ruling that Title II does not reach employment discrimination, which gave rise to a circuit conflict, would thereby be deprived of precedential force. Alternatively, if this Court rejects the State's assertion of sovereign immunity, it will proceed to determine whether employment discrimination claims may be brought under Title II.

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TABLE OF CONTENTS

Second Supplemental Brief of the Petitioner 1

TABLE OF AUTHORITIES

Cases

Alsbrook v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), *pet. for cert. pending*, No. 99-423 ..... 8, 9

Amos v. *Maryland Dep't of Public Safety & Correc. Servs.*, 178 F.3d 212 (4th Cir. 1999) 7, 8

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 6, 8

Coolbaugh v. *State of La.*, 136 F.3d 430 (5th Cir. 1998) ... 6, 8

Dare v. *California*, 191 F.3d 1167 (9th Cir. 1999) 8

Florida Prepaid Postsecondary Educational Expense Board v. *College Savings Bank*, 527 U.S. ___ (1999).... 6, 8

Garrett v. *University of Ala. at Birmingham*, 193 F.3d 1214 (11th Cir. 1999) 8

Gregory v. *Ashcroft*, 501 U.S. 451 (1991) 4

Kimel v. *State of Fla. Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) 7

Martin v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999) 8

Massachusetts Bd. of Retirement v. *Murgia*, 427 U.S. 307 (1976) (per curiam) 4

Muller v. *Costello*, 187 F.3d 298 (2d Cir. 1999) 7, 8

No. 98-1117, *Illinois State Univ.* v. *Varner* 3

No. 98-1448, *California St. Bd. of Equalization* v. *Atchison, Topeka & Santa Fe Ry. Co.* 3

No. 98-1845, *SUNY, College at New Paltz* v. *Anderson* 3

No. 98-584, *California St. Bd. of Equalization* v. *Southern Pac. Transp. Co.* 3

No. 98-791, *Kimel* v. *Florida Board of Regents* (Jan. 11, 2000) ..... passim

No. 98-829, *Florida Dep't of Corrections* v. *Dickson* (relisted for January 14, 2000 Conference) 3

No. 99-423, *Alsbrook* v. *Maumelle* ("*Alsbrook*") 3

No. 99-424, *Brown* v. *N.C. D.M.V.* 3

No. 99-940, *DeBose* v. *Nebraska* 3

Seminole Tribe of Florida v. *Florida*, 517 U.S. 44 (1996). 6, 8

Vance v. *Bradley*, 440 U.S. 93 (1979) 4

Statutes

29 U.S.C. § 623(a)(1) 4

29 U.S.C. § 623(f)(1) 5

42 U.S.C. § 12107(a)(7) 7

Other Authorities

H.R. Rep. No. 101-485(III), at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 447-48 7

SECOND SUPPLEMENTAL BRIEF OF THE PETITIONER

Petitioner Scot L. Zimmerman respectfully submits this Second Supplemental Brief in light of this Court's decision in No. 98-791, *Kimel* v. *Florida Board of Regents* (Jan. 11, 2000), holding that the Age Discrimination in Employment Act ("ADEA") does not validly abrogate States' sovereign immunity from suit.

In addition to this Petition, the Court now has before it three other Petitions for Certiorari presenting the question whether the Americans With Disabilities Act ("ADA") validly abrogates States' sovereign immunity from suit, as well as a Petition raising a similar challenge to a regulation issued pursuant to the ADA.[1] The Court should grant certiorari now to resolve the circuit split these Petitions present and the important constitutional question they raise, rather than remanding these cases for further consideration in light of *Kimel*. In particular, the considerations normally militating in favor of a GVR Order in this circumstance are overborne because (a) *Kimel* announces no new principle of law or application of law to fact that would benefit from percolation in the lower courts, particularly in light of the fact that the con-

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[1] No. 98-829, *Florida Dep't of Corrections* v. *Dickson* (relisted for January 14, 2000 Conference); No. 99-423, *Alsbrook* v. *Maumelle* ("*Alsbrook*") (curve-lined for January 14, 2000 Conference with this Petition); No. 99-940, *DeBose* v. *Nebraska* (set for January 21, 2000 Conference); *see also* No. 99-424, *Brown* v. *N.C. D.M.V.* (addressing regulation issued pursuant to the ADA as valid abrogation of state sovereign immunity; set for January 14, 2000 Conference). Pending also are petitions asserting state sovereign immunity under the Equal Pay Act (No. 98-1117, *Illinois State Univ.* v. *Varner*; No. 98-1845, *SUNY, College at New Paltz* v. *Anderson*) and the Railroad Revitalization and Regulatory Reform Act (No. 98-584, *California St. Bd. of Equalization* v. *Southern Pac. Transp. Co.*; No. 98-1448, *California St. Bd. of Equalization* v. *Atchison, Topeka & Santa Fe Ry. Co.*), which have been relisted for the January 14, 2000 Conference.

stitutionality of the ADA's abrogation provision has already been the subject of extensive recent analysis by seven circuits, and (b) the Court has a unique opportunity to resolve the issue during this Term, thereby avoiding substantial uncertainty and delay regarding the scope of an important federal civil rights statute.[2]

a. The Court's analysis in *Kimel* proceeds in two parts. First, the Court held that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act." *Kimel*, slip op. at 18. After reviewing its precedents holding that discrimination against the aged is not subject to heightened judicial scrutiny,[3] the Court reiterated that the Constitution imposes no obstacle to States "rely[ing] on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests." *Id.* at 20. Unlike the Fourteenth Amendment, the *ADEA* "makes unlawful, in the employment context, *all* 'discriminat[ion] against any individual . . . because of such individual's age.'" *Id.* at 22 (quoting 29 U.S.C. § 623(a)(1) (alterations in *Kimel*)) (emphasis added). The statute thus imposes a "broad restriction on the use of age as a discriminating factor" and accordingly "prohibits substantially more state employment decisions and practices than would likely be unconstitutional." *Id.* Although employers may invoke a defense for certain "bona fide occupational qualifications," the statute nonetheless "imposes substantially higher burdens on state employers" than the Constitution because this "extremely narrow exception" does not overcome a

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[2] In addition, as Petitioner explained in a previously filed Supplemental Brief, by granting certiorari in this case, the Court necessarily would resolve a further important circuit conflict regarding whether Title II of the ADA applies to employment discrimination claims.

[3] *See Gregory* v. *Ashcroft*, 501 U.S. 451 (1991); *Vance* v. *Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (per curiam).

"presumption" in favor of liability. *Id.* at 23 (quotation marks and citation omitted).[4]

Second, the Court confirmed that "[d]ifficult and intractable problems often require powerful remedies, and we have never held that §5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel*, slip op. at 24. The strict liability provisions of the ADEA, however, were not "such an appropriate remedy," but "instead, merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination." *Id.* In particular, "Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem," given that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id.* at 25.

b. This Court should grant plenary review rather than remanding this and other Petitions addressing whether the ADA validly abrogates States' sovereign immunity for further consideration in light of *Kimel*. The Court's decision in *Kimel* announces no new principle of law, and in particular announces no new standard for evaluating whether a federal statute ostensibly enacted pursuant to Congress' powers under Section 5 of the Fourteenth Amendment validly abrogates States' sovereign immunity.[5] Instead, the opinion follows

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[4] A further provision of the Act "simply makes clear that" under the ADEA, unlike the Constitution, "the employer cannot rely on age as a proxy for an employee's remaining characteristics." *Kimel*, slip op. at 24 (citing 29 U.S.C. § 623(f)(1)) (quotation marks, citation, and alteration omitted).

[5] The only possible exception is the Court's analysis of whether the ADEA contains a sufficient plain statement of an intent to abrogate States' sovereign immunity. *Compare Kimel*, slip op. at 8-13 *with id.* (Thomas, J., dissenting). But the ADA contains an absolutely unambiguous abrogation provision that is entirely unaffected by the *Kimel* analysis. *E.g.*, *Coolbaugh* v. *State of La.*, 136 F.3d 430, 433 (5th Cir. 1998) ("The first prong–Congress' intent to abrogate state immunity–is patently clear in the ADA.") (citing 42 U.S.C. § 12202 ("A State shall not be immune under

directly from the Court's earlier decisions in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996) (holding that Congress may not abrogate States' sovereign immunity under Article I, but may do so pursuant to § 5 of the Fourteenth Amendment), *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act is not valid application of Congress' § 5 powers), and *Florida Prepaid Postsecondary Educational Expense Board* v. *College Savings Bank*, 527 U.S. ___ (1999) (holding that Plant Variety Protection Remedy Clarification Act is not a valid application of Congress' § 5 powers). Thus, the Court in *Kimel* reiterated the "congruence and proportionality test" developed in *City of Boerne* and applied once again in *Florida Prepaid*, *see* slip op. at 17-18, then held that the ADEA was similarly invalid "applying *the same* 'congruence and proportionality' test in these cases." *Id.* at 18 (emphasis added). In fact, the *Kimel* dissent did not contend that the majority had varied at all from its earlier explication of the "congruence and proportionality test." *Id.* (Stevens, J., dissenting).

Moreover, the Court's application of the "congruence and proportionality test" to the ADEA is largely inapposite to a similar challenge to the ADA in four critical respects.

1. *Kimel* explained that the aged "have not been subjected to a history of purposeful unequal treatment." *Kimel*, slip op. at 19. By contrast, "Before enacting the ADA, Congress considered a wide range of evidence and made findings. Both the House and the Senate cited *seven* substantive studies or reports to support its conclusion that discrimination against the disabled is a serious and pervasive problem." *Coolbaugh* v. *State of La.*, 136 F.3d 430, 436 (5th Cir. 1998).

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the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.")).

2. *Kimel* emphasized that "[o]ld age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it." *Kimel*, slip op. at 19 (quotations and citations omitted). Disability is, once again, distinct: "Congress made several findings of both past and present discrimination against the disabled in the country's general population that it determined violated the Equal Protection Clause," *Amos* v. *Maryland Dep't of Public Safety & Correc. Servs.*, 178 F.3d 212 (4th Cir. 1999), and "specifically found that 'individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment,'" *Kimel* v. *State of Fla. Bd. of Regents*, 139 F.3d 1426, 1433 (11th Cir. 1998) (quoting 42 U.S.C. § 12107(a)(7)).

3. *Kimel*'s rationale that States properly may use age as a proxy for other characteristics does not apply to the disabled: "Congress considered and rejected the assumption that the 'inferior economic and social status of disabled people . . . [was] an inevitable consequence of the physical and mental limitations imposed by disability,' instead attributing the inferior status to 'discriminatory policies based on unfounded, outmoded stereotypes and perceptions, and deeply imbedded prejudices toward people with disabilities.'" *Muller* v. *Costello*, 187 F.3d 298, 309 (2d Cir. 1999) (quoting H.R. Rep. No. 101-485(III), at 25 (1990), *reprinted in* 1990 U.S.C.C.A.N. 447-48) (alterations in *Muller*).

4. There is a critical difference between the ADEA's absolute prohibition on discrimination and the ADA's remedial provision. "[T]he remedial purposes of the ADA are tailored to remedying and preventing the discriminatory conduct, and are thus congruent and proportional to the injury to be prevented or remedied. The Act only prohibits discrimination against 'qualified individuals,' and it requires only 'reasonable accommodations' that do not im-

pose an 'undue burden' on the employer." *Martin* v. *Kansas*, 190 F.3d 1120, 1128 (10th Cir. 1999).

c. It nonetheless likely would be appropriate to remand for further consideration in light of *Kimel* if there were some realistic prospect that percolation in the lower courts would aid in the determination of the ADA's constitutionality. But that is not the case. This issue already has been the subject of extensive recent analysis in the circuits, far beyond what would be expected in the normal course of constitutional litigation. *Seven* circuits already have addressed the question: *all* of those decisions apply the "congruence and proportionality test" in light of this Court's decisions in *Seminole Tribe* and *City of Boerne*; four analyze the question in light of *Florida Prepaid*, all sustaining the ADA.[6] As noted *supra*, nothing in this Court's decision in *Kimel* suggests a further avenue of inquiry by the courts of appeals.

It also would be appropriate to remand for further consideration in light of *Kimel* if there were some realistic prospect that the circuit conflict over the ADA's constitutionality would thereby be resolved in favor of sustaining the statute. But that is exceedingly unlikely, and *Kimel* is instead most likely to leave the constitutionality of the ADA in a state of intolerable uncertainty. Although there are substantial distinctions between the ADA and the ADEA, *see supra*,[7] this Court's decision in *Kimel* can only realistically be read to call the ADA's abrogation provision into question. In other

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[6] *See Garrett* v. *University of Ala. at Birmingham*, 193 F.3d 1214 (11th Cir. 1999); *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999); *Martin* v. *Kansas*, 190 F.3d 1120 (10th Cir. 1999); *Muller* v. *Costell*, 187 F.3d 298 (2d Cir. 1999); *Alsbrook* v. *City of Maumelle*, 184 F.3d 999 (8th Cir. 1999) (en banc), *pet. for cert. pending*, No. 99-423; *Amos* v. *Maryland Dep't of Pub. Safety & Correc. Servs.*, 178 F.3d 212 (4th Cir. 1999); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir.), *cert. denied*, 119 S. Ct. 58 (1998).

[7] *See also Kimel* v. *State of Fla. Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998) (sustaining challenge to ADEA but rejecting challenge to ADA).

words, although the rationale of *Kimel* does not dictate holding States immune from suit under the ADA, neither does it affirmatively insulate the ADA from challenge. In particular, *Kimel* does not call into question the en banc Eighth Circuit's reasoning in *Alsbrook* v. *Maumelle*, 184 F.3d 999 (8th Cir. 1999), *pet. for cert. pending*, No. 99-423, in sustaining an Eleventh Amendment challenge to the ADA, and that circuit accordingly would be essentially certain to reinstate its holding on remand.[8] Nor is the Eleventh Amendment protection afforded under *Kimel* so strong that there is a realistic possibility that (a) the six circuits that have rejected such a challenge under the ADA would reverse course, and also (b) this Court would depart from its consistent practice of reviewing decisions holding important federal statutes unconstitutional and refrain from considering the issue altogether.

d. The import of these points is heightened by the fact that these cases come before the Court in time for them to be resolved during this Term. An order remanding for further consideration, by contrast, would delay definitive resolution of the constitutionality of the ADA for at least a year, if not more. On remand, both private parties and the States would be subject to the costs of repetitive and unnecessary litigation only to await a definitive ruling by this Court. Congress itself will be left in a state of uncertainty regarding whether it is necessary, or indeed possible, to make further findings with respect to the disabled in order to determine whether States should be subject to suit under the ADA. Considerations of

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[8] *Compare, e.g.*, *Alsbrook*, 184 F.3d at 1009 & n.17 ("We do not think that the legislative record of the ADA supports the proposition that most state programs and services discriminate arbitrarily against the disabled."; "In fact, the legislative record of the ADA suffers from exactly the same infirmity that the Supreme Court noted with respect to the legislative record of the PRA–an absence of a showing of widespread discrimination on the part of the states.") *with Kimel*, slip op. at 25 ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.").

judicial economy and comity with other branches of government therefore counsel in favor of granting certiorari at this time.

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